

ROMERO -CROSS - DEFENSE

1 do you have any idea?

2 THE WITNESS: It was given to me  
3 afterwards, so I guess it was prepared in the  
4 apartment after they searched. I was not there  
5 when it was done, sir. I was still down here.

6 MR. KEITH: Let's mark this Defendant's  
7 Exhibit F.

8 Q. I'd like you to take a look at what's been  
9 marked as Defendant's Exhibit F for identification and  
10 see if it refreshes your recollection with regard to  
11 the items that were in open view in the fourth floor  
12 apartment on November 1, 2007.

13 A. You want me to read the whole thing or tell  
14 you what's on the desk. What was on the desk --

15 Q. Take a look at it, refresh your recollection,  
16 put it down and then tell the jury what you recall.

17 A. Two scales on the desk, not one scale.

18 Q. What else?

19 A. Ziploc bags for packaging on a mantel.  
20 Underneath the desk was a large heat sealer which is  
21 used to heat seal small bags, and a lot of residue on  
22 the table.

23 Q. Detective Romero, you were involved in the  
24 investigation that led to the issuance of the initial  
25 warrants, the warrants for the second floor and what

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1 you believed to be the third; is that correct?

2 A. That is correct, sir.

3 Q. And while involved in that investigation,  
4 isn't it true that in investigation with those  
5 warrants, there was no information that implicated  
6 Edward Green in any way?

7 A. That's correct.

8 Q. With regard to the fourth floor, before going  
9 into the apartment where you found Mr. Green, did you  
10 try the keys on any other doors on to the fourth floor?

11 A. Like I stated before, I tried them after,  
12 before I came down here.

13 Q. On the fourth floor I'm talking about.

14 A. I tried them after, before I came down here I  
15 knew it would be a question if the keys fit any other  
16 door, and that's why I tried them on other doors.

17 Q. Page 304, starting at line six. Again, these  
18 are questions by Justice McLaughlin.

19 "Were there four separately divided rooms  
20 on the fourth floor?"

21 You answered: "Yes, sir."

22 Justice McLaughlin: Did each of those  
23 have a lock?

24 You answered: "Yes."

25 The Judge: "And how was it that you went

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1                   into the one where Mr. What's-his-name was found,  
2                   the fellow sitting on the couch, I think, how did  
3                   you get in there?"

4                   You answered: I opened it with a key,  
5                   opened the door on the fourth floor that also  
6                   opened door that the cables were going into.

7                   Judge: "You said the door in which the  
8                   fellow was ultimately found on the fourth floor  
9                   was the only door to which keys fit, so I assume  
10                  that at least one of the other of the three other  
11                  rooms on the fourth floor landing you tried the  
12                  keys?"

13                  You answered: "Yes."

14                  Do you recall being asked those questions  
15                  and giving those answers?

16                  A. Yes, I do.

17                  Q. So is it your recollection that you tried the  
18                  keys on the other doors on the fourth floor or you went  
19                  straight to the apartment where Mr. Green was?

20                  A. I stated numerous times that after we entered  
21                  the apartment and placed Mr. Green under arrest, I  
22                  tried all the doors. If I was asked did it open any  
23                  other doors, I would have the answer.

24                  MR. KEITH: May we approach?

25                  THE COURT: Yes.

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(Whereupon, a sidebar conference was held on the record out of the hearing of the jury.)

MR. KEITH: Your Honor, I'm going to wrap it up shortly. With regard to the trying of the keys on the third, can I now ask that question?

THE COURT: I don't think so. The question that he just was asked, I was listening needless to say, because it's interesting to hear your own questioning, there was no context as far as time. So I assume if you are to ask him a question about the third floor, the answer is going to be similar to what he's given. He's going to say whatever he's going to say, but it will be in the context that I knew I was going to be asked if the keys deal with the third floor. What did he say at the Darden hearing about the third floor that you want to contrast?

MR. KEITH: I wanted to go back to the affidavit and --

THE COURT: No.

MR. BERLAND: While we're here, as far as the stipulations and publishing the stuff for jury, do you want it done after?

THE COURT: We will do that today. As soon as you guys are finished, I will send them

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1 out and ask the loyal court reporter to find us  
2 and read us the disputed part of the keys so that  
3 before the jury comes back in I'll have a better  
4 idea of what actually was said. I may not make a  
5 ruling. We'll, all three, hear it at the same  
6 time.

7 MR. BERLAND: I will ask for a bathroom  
8 break right before we do that.

12                   Q. Detective Romero, with regard to the execution  
13                   of the warrants of the second and third floor, what  
14                   time did that activity start?

15           A. We had a tact meeting back at our office  
16       at 4:30 in the afternoon on the 1st. Around 5:00, five  
17       after five, we headed to vicinity of the location which  
18       is only a few blocks from my office, and we executed  
19       the first warrant. The entry time was 1720, which  
20       is 5:20.

21 Q. Would you describe that as the afternoon?

22           A. Five-twenty in the afternoon, yes, late  
23           afternoon.

24 Q. With regard to the third floor, I know it's  
25 your testimony that you went to the third floor after

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1       the warrant was obtained and executed on the fourth  
2       floor; am I understanding you correctly?

3           A. As far as what?

4           Q. You tried the keys to the apartments on the  
5       third floor?

6           A. On my way down, I tried the keys on all the  
7       apartments, yes.

8           Q. Was that after the warrant was executed on the  
9       fourth floor?

10          A. No, sir.

11          Q. When was that, the sequence?

12          A. Once Mr. Green was in custody and I was going  
13       down to see Mr. Berland, I went down and I tried the  
14       keys in all the doors. This way, if I was asked, does  
15       it work in all the doors, and the answer was no.

16          Q. When you went to those apartments, did you see  
17       any residents?

18          A. Two different people came out. I knocked  
19       before I put a key in the door.

20          Q. Did you go into any of those apartments?

21          A. No, sir.

22          Q. Did you look into any of those apartments?

23          A. No, sir.

24           THE COURT: Did he look in any of the  
25       apartments or either of the two apartments from

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1 which he said people came out.

2 THE WITNESS: What's the question?

3 THE COURT: I am asking Mr. Keith.

4 MR. KEITH: What was the question?

5 THE COURT: Precisely. You said did you  
6 look into any of those apartments. I didn't know  
7 whether you were asking whether he looked into  
8 either of the apartments from who he said somebody  
9 emerged after he knocked or whether you were  
10 asking whether somehow he looked into any of the  
11 other five apartments.

12 Q. Can you answer that, Detective?

13 A. I said I didn't look. People answered the  
14 door and I told them I was trying the key. I asked if  
15 they were okay and they said yes and they closed the  
16 door.

17 Q. Page 39, line 11, again directing your  
18 attention to the hearing when you were questioned by  
19 Justice McLaughlin.

20 The Judge asked you: "Did you ultimately  
21 get into the eight apartments on the third and  
22 fourth floor?"

23 You answered: "No, sir."

24 Judge: "Did you get into any of them?"

25 You answered: "We knocked on a few

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1 doors."

2 The Judge: "Some people opened?"

3 You said: "Yes, yes."

4 The Judge: "You stuck your head in to  
5 make sure there was nobody?"

6 And you answered: "Correct."

7 Is that what happened?

8 A. They opened the door. They did the proper  
9 thing. I knocked on the door, said police, they opened  
10 the door, I asked if they were okay, I told them I was  
11 trying key, and that was it.

12 THE COURT: Same instruction.

13 Q. Detective, is it fair to say that with regard  
14 to your recollection of what happened on November 1,  
15 2007, that, obviously, it would be clearer back in  
16 November of 2007 and in the month thereafter as opposed  
17 today?

18 A. I don't see anything different, no.

19 Q. Since the time, I would imagine you've been  
20 involved in other search warrants?

21 A. Numerous, yes, sir.

22 Q. And you made a number of arrests since then?

23 A. Yes, sir.

24 Q. So would it be fair to say that your  
25 recollection with regards to the activities of

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1 November 1st were clearer back then?

2 A. Would be clearer on that day, yes. After  
3 reviewing my notes, I don't see any --

4 MR. KEITH: No further questions.

5 THE COURT: Anything?

6 MR. BERLAND: No.

7 THE COURT: You're excused.

8 (The witness was excused.)

9 THE COURT: I will ask you folks to step  
10 out. I want you folks to be available in  
11 about 12 minutes, maybe 15. We will have you out  
12 of here by ten of five, real time.

13 Keep an open mind. Do not discuss the  
14 case. When you come back in, we'll show you the  
15 property that I promised you and tell you a little  
16 bit more. I need to consult with the lawyers and  
17 reporter about what we are going to do tomorrow.

18 (Jurors exit.)

19 (The record was read back by the court  
20 reporter as requested.)

21 THE COURT: We're winding down. The  
22 Court reporter has graciously found and read to us  
23 the opening statement by Mr. Keith. The defendant  
24 undoubtedly is with the phrase clearly others had  
25 access to the apartment as did the police either

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1 keys or the key they found on the second floor  
2 from Mr. Brown, not Mr. Green's apartment, he's  
3 not the lessee, it's not his business, apartment,  
4 car, et cetera, clearly others had access to the  
5 apartment. I want to hear what you have to say,  
6 both sides, about that.

7 Last time I dealt with this, I was  
8 willing to say okay, and Court of Appeals wasn't.  
9 I believe that you are allowed to say that you're  
10 not going to hear any evidence that the defendant  
11 had keys to the apartment. That might be where  
12 the Court of Appeals says that's not so good, but  
13 I think it's okay. What we have here is clearly  
14 others had access to the apartment, that means  
15 Mr. Green had no access to the apartment.

16 MR. KEITH: I don't know if that's an  
17 inference. The People are going to argue just the  
18 opposite, Your Honor.

19 THE COURT: Let me hear him and you will  
20 get the last word.

21 MR. BERLAND: If you'd like, I will pull  
22 case law. Same arguments that I made earlier.

23 THE COURT: Let's leave it at that. Pull  
24 some cases. We'll come in 20 minutes before the  
25 jury.

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1                   MR. KEITH: Let me say this real quick.

2                   In his opening, he indicated that the experienced  
3                   detective took the keys to search the fourth  
4                   floor, they used the key to open up the door, and  
5                   basically I just repeated that and stated the  
6                   obvious. Once they got the keys from another  
7                   location, would appear to me that the obvious  
8                   natural flow, the inference that can be drawn from  
9                   that is that other People have access to this  
10                  apartment. I think that argument is available to  
11                  me once it's mentioned that keys were found in a  
12                  jacket on the second floor were used to gain  
13                  access to the apartment.

14                  THE COURT: Maybe. But what I pointed out  
15                  I think was that when literally a litany of the  
16                  lack of things that the apartment is as to  
17                  Mr. Green, lessee, owner, tenant, business, not  
18                  his trunk, not his car and that he is in the wrong  
19                  place at the wrong time, when you say at the end  
20                  of the litany what the connection is absent, you  
21                  don't say anything other than finish the thought I  
22                  think is the most logical way to say it. He  
23                  doesn't have this connection, this doesn't have  
24                  this connection, this doesn't have this  
25                  connection, this isn't his place, he doesn't do

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1           this. Your words "clearly others had access to  
2           the apartment," clearly he --

3           MR. KEITH: Unfortunately, that argument  
4           is available to me. They found a key in another  
5           location. I think it naturally flows that the  
6           suggestion is that others have access.

7           THE COURT: Sure, and that means others  
8           have access, he doesn't.

9           MR. KEITH: I don't know if that's the  
10          natural flow. Certainly others have access.

11          THE COURT: We're finished. Find cases.  
12          We'll bring in the jury. I'll summarize  
13          stipulation, we will see the property and cianara  
14          for the day.

15          MR. KEITH: Your Honor, that litany of  
16          questions is from the CJI charge from constructive  
17          possession.

18          THE COURT: Sure. Everybody's got to  
19          adopt every CJI charge to the situation. CJI  
20          charge doesn't automatically come in every time  
21          evidence is suppressed. That argument is available  
22          every time. I'm sure this doesn't come as a major  
23          surprise.

24           Bring in the jurors.

25           COURT OFFICER: Jury entering.

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1                   THE COURT: When I gave you the  
2 preliminary instruction, I said there were three  
3 ways to get evidence. I said that via stipulation.  
4 There are two stipulations here with respect to  
5 the material that was seized, supposedly being  
6 narcotics, and there are stipulations with respect  
7 to two different voucher numbers, the voucher  
8 numbers the ones ending in 21910 and 21912.

9                   With regard to 21912, a chemist received  
10 this intact condition, in an envelope, sealed. He  
11 or she opened it, weighed it, analyzed it. The  
12 weight was 17.87 ounces. The chemist determined  
13 that it was cocaine and the chemist resealed it  
14 and sent it back and it is what is introduced into  
15 the trial here.

16                  The other voucher, 2910, is also cocaine.  
17 The chemist received it sealed, analyzed it. The  
18 weight is .16 ounces or 4.7 grams and then the  
19 chemist sealed it, sent it back and the thing  
20 admitted in the trial also. You can see the  
21 exhibits. I reiterate, you do not have to memorize  
22 the details. Please pass the things among each  
23 other.

24                  There are some legal things that the  
25 lawyers and I have to do tomorrow. We'll start

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1 at 9:45. I need you folks here at 10:15, and there  
2 will be some more of the trial.

3 Whether we get to the possibility where I  
4 put you into a position to decide the case  
5 tomorrow or Monday, I don't know. We will not  
6 know until tomorrow. Plan on it being Monday, but  
7 I don't know what's going to happen.

8 If you need the stuff in the room during  
9 the deliberations, you can ask for it. The  
10 stipulations are now in evidence. You are all  
11 looking at me which means you probably have seen  
12 the exhibits.

13 Tomorrow's schedule, who knows. I suggest  
14 that you bring something to read because I know  
15 that from 12:30 until 2:30 I will not be  
16 available. There is a circumstance under which you  
17 may be in the jury room deliberating. Also a  
18 circumstance that that will not be happening and  
19 you will be asked to come back after 2:30. Or  
20 we'll finish and you will have Friday afternoon  
21 off. I don't know.

22 When I get this, I don't get a crystal  
23 ball. I try to keep you updated on the  
24 possibilities. I want you here at 10:10. I would  
25 have resolved whatever it is I'm doing and we'll

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1 do the next thing.

2 Keep an open mind. Do not discuss the  
3 case. Do not go to the area. Do not discuss the  
4 case or look at anything in media form. If you are  
5 reading it, disassociate yourself immediate from  
6 it, whether this case or similar case. Do not let  
7 anybody speak or influence your judgment. This  
8 doesn't mean I think somebody will try to do it.  
9 We're required to mention this to each jury in  
10 every case.

11 Be on time. You've been very good. See  
12 you tomorrow at 10:10. Thank you.

13 (Jurors exit.)

14 THE COURT: We'll also have the charge  
15 conference tomorrow. I plan to do CJI on  
16 constructive possession and in concert. I asked  
17 the assistant to see whether or not, based on the  
18 vouchers for the drugs because my recollection of  
19 where things were turned out to be faulty. I  
20 asked him because I thought some of the stuff on  
21 the fourth floor was actually packaging. That was  
22 not the case. I was worried about what a jury  
23 could do if they discount stuff in the safe but  
24 agree with stuff in the fourth floor, but there  
25 isn't any. It is the safe or nothing on the fourth

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1 floor. He's obviously, accused of the second floor  
2 which is the C felony under the weight or B felony  
3 under the possession with intent to sell or is it  
4 both from your standpoint if the C is based on  
5 weight as being a lesser included?

6 MR. BERLAND: Both. On the indictment,  
7 we have the B possession with intent to sell. From  
8 our standpoint that's all it is, the second floor.

9 THE COURT: I thought that you said that  
10 the weight of the packaged drugs on the second  
11 floor was in excess of an eighth or half ounce.

12 MR. BERLAND: Of an eighth. That's not on  
13 the indictment.

14 THE COURT: Understand that.

15 MR. BERLAND: Correct.

16 THE COURT: You will have an option, I  
17 believe, under the first count which charges in  
18 excess of eight ounces, you will have the option  
19 of asking for a lesser included of the C felony of  
20 the stuff on the second floor when in excess of an  
21 eighth of an ounce. I believe the theory being  
22 the jury could decide if your client basically was  
23 somehow involved in this, but the People could not  
24 prove he had any control over the stuff in the  
25 safe, they can decide he was liable in concert

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1                   with Mr. Brown for what was on the second floor of  
2                   a C felony in excess of an eighth of an ounce. You  
3                   can decide whether to charge that or all or  
4                   nothing with the overall weight charge being in  
5                   excess of an eight ounces. His not testifying you  
6                   will tell me at the request to charge, and we'll  
7                   talk about this key thing at 9:45.

8                   MR. KEITH: With regard to count two, the  
9                   intent to sell, it is the People's theory that  
10                  it's not constructive possession, it is the acting  
11                  in concert.

12                  THE COURT: You have to look at him.

13                  MR. BERLAND: Both. He possessed all of  
14                  this with intent to sell it.

15                  THE COURT: If I had to answer the jury's  
16                  question, the People's contention is that he is  
17                  responsible for everything and responsible under  
18                  the second count for intending in concert or alone  
19                  with Brown to sell some or all, that he is liable  
20                  for having possessed alone or in concert.

21                  MR. KEITH: Your Honor, I think that  
22                  count should be dismissed.

23                  THE COURT: I'm sure you do. What are  
24                  you talking about?

25                  MR. KEITH: There's no rational theory

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1                   that fits the second floor apartment. The acting  
2                   in concert doesn't fly, and certainly no  
3                   constructive possession.

4                   THE COURT: The stuff on the second floor  
5                   apartment is the stuff that is actually packaged  
6                   with the label on it with the stamp, 67 little  
7                   envelope things.

8                   MR. KEITH: But the detective said it's a  
9                   stamp that's pretty common, seen them in other  
10                  cases, other search warrants.

11                  THE COURT: What I know is it's a  
12                  well-known brand for sale. It wouldn't be a  
13                  common brand in whatever region it is if it  
14                  weren't well sought after.

15                  MR. KEITH: So that's enough to prove  
16                  beyond a reasonable doubt --

17                  THE COURT: You keep doing this. It's  
18                  enough for the jury to make the decision. What  
19                  they do is up to them. See you tomorrow.

20                  MR. BERLAND: I will have  
21                  Detective Romero here.

22                  THE COURT: See you tomorrow.

23  
24  
25

YVETTE PACHECO SENIOR COURT REPORTER

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK PART-93

3 THE PEOPLE OF THE STATE OF NEW YORK,

4 -against-

5 TRIAL

6 EDWARD GREEN,

7 Defendant

8 September 12, 2008

9 B E F O R E: HONORABLE E. MCLAUGHLIN, JSC

11 (Appearances as previously mentioned.)

12 -----  
12 COURT OFFICER: Case on trial continued.

13 All parties are present. Let's continue.

14 MR. BERLAND: Can I be heard as to the  
15 keys, Your Honor?

16 THE COURT: Yes. Anybody have anything  
17 they want me to read?

18 MR. BERLAND: I have a few cases. Let me  
19 hand them up. People V Melendez, People V Massie,  
20 and People V Shack. Court of Appeals cases. And  
21 yesterday I provided People V Rojas. I'm  
22 providing a copy to Counsel as well.

23 THE COURT: Is there anything you want me  
24 to read, Mr. Keith?

25 MR. KEITH: No, Your Honor.

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1                   THE COURT: What else do you want to say?

2                   MR. BERLAND: People V Melendez is the  
3 leading "opening the door case" in New York. It  
4 holds when a door has been opened, and as Your  
5 Honor is aware there is no bright line rule, and  
6 it is within the discretion of the trial court,  
7 redirect examination is permissible to a point.

8                   This is key words the Court of Appeal  
9 uses, "cannot bring out remote and tangible  
10 evidence" and "must bear evidence." And only  
11 evidence that must be made necessary by the  
12 opponent's action should be allowed.

13                  In our case, evidence regarding the keys  
14 being found on the Defendant is necessary based on  
15 defense counsel's opening statement. The evidence  
16 I propose to offer is neither remote nor tangible.  
17 It's paramount to the case. Allowing testimony  
18 would not be anything like in Melendez because I  
19 asked one or two questions focused on whether or  
20 not keys were found on the defendant and whether  
21 they accessed any of the apartments. That's it.

22                  I said People versus Rojas yesterday. I  
23 will not get back into that. It states a door is  
24 opened when a misleading argument is put before  
25 the case.

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1                   People V Massie, I believe, is the most  
2                   recent Court of Appeals case to fully discuss the  
3                   concept in the suppression term, and it holds that  
4                   a trial court does not abuse the discretion by  
5                   allowing necessary evidence as long as the  
6                   evidence is not too remote.

7                   The last case I provided is People V  
8                   Shack. In that case, defense counsel obtained a  
9                   pretrial ruling that the defendant's mental  
10                  illness cannot come into the trial. The Court of  
11                  Appeals held that the door was opened by  
12                  interjecting issue into the opening.

13                  We reviewed the opening in this case  
14                  yesterday. The only assumption that can be made  
15                  when defense counsel states clearly forced access  
16                  to the room, after listing a whole list of reasons  
17                  that distances the defendant from the room and  
18                  stated "in the wrong place at the wrong time" is  
19                  that the defendant did not have access to the  
20                  room.

21                  The defendant doesn't have a burden to  
22                  open, but chose to interject the issue in the  
23                  opening and into this case. They cannot use a  
24                  suppression issue as a shield and sword.

25                  Defendant affirmatively misled, whether things

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PROCEEDINGS

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1 lead to or not evidence, and evidence of keys must  
2 come in. Not saying it was intentional.

3 THE COURT: Mr. Keith.

4 MR. KEITH: Your Honor, I totally  
5 disagree. First of all, the opening statement is  
6 not evidence. I made that clear to the jury, and  
7 Your Honor made that clear to the jury.

8 Secondly, my statement with regard to the  
9 fact that the People opened by indicating that the  
10 officers used keys to get into the apartment where  
11 Mr. Green was found, I restated in my opening  
12 that, yes, the police officers used keys to get  
13 into that room.

14 I think it's necessary -- not necessary.  
15 It's a logical progression to ask that obviously  
16 others had access to the room. They got the key  
17 from another location.

18 There's been some minor question with  
19 regard to where that key was actually found.  
20 Your Honor, in a pretrial hearing, questioned the  
21 detective and made it absolutely clear that the  
22 key was recovered from a jacket that was on a  
23 chair in the second floor apartment, and near that  
24 jacket was the co-defendant, Steven Brown. The  
25 People mischaracterized that testimony from day

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1                   one to say that the key was recovered from Steven  
2                   Brown.

3                   In any event, that's the way the opening  
4                   statement, which is not evidence, came out, and  
5                   that was my reaction to it.

6                   Now, during the trial, which is basically  
7                   at its end, we heard from both detectives. There  
8                   hasn't been much said about the key, except that,  
9                   again, it was erroneously stated that the keys  
10                  were recovered from Steven Brown.

11                  On cross-examination, I brought out that  
12                  the keys were recovered from a jacket on a chair  
13                  near Steven Brown. Nothing else has been said  
14                  about keys.

15                  Melendez, I think, supports my argument.  
16                  Opening the door analysis necessarily has to be  
17                  approached on a case-by-case basis. Under the  
18                  facts of this case, I don't think the door has  
19                  been opened to allow in keys that were seized as a  
20                  result of legal police activity.

21                  The Rojas case, in that case, defense  
22                  attorney made his argue -- made remarks in his  
23                  opening and followed that up by cross-examination,  
24                  and that was dealt with at that time on redirect.

25                  I think the People's argument here to try

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1 to get keys in now are untimely, and it's not  
2 supported by the evidence. It was by a -- he's  
3 trying to get keys in by a remark that's not in  
4 evidence, by a remark made in the opening. This  
5 issue was dealt with during the trial testimony.

6 I think it would be extremely prejudicial  
7 to Mr. Green to allow the keys in at this juncture  
8 under these circumstances. I respectfully ask  
9 Your Honor to not allow the People to do it.

10 THE COURT: The defendant's opening,  
11 including his attorneys, stated that the defendant  
12 was in the wrong place at the wrong time. The  
13 opening presented a series of statements regarding  
14 the defendant's lack of connection with the fourth  
15 floor apartment, including it's not his office, he  
16 does not lease it, it's not his automobile, among  
17 other representations.

18 Additionally, the attorney referred to  
19 the answers given to him by two separate  
20 prospective jurors who were residential  
21 superintendents, that they frequently were alone  
22 inside the apartment as part of their  
23 responsibilities.

24 Parenthetically, that is in the same voir  
25 dire where the attorney stated, on top of being an

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1 accused not testifying during his or her own  
2 trial, prefaced that statement with a reference to  
3 the "there are two sides to every story."

4 Mr. Keith's opening to the statement then  
5 said, clearly others had access to it, such as  
6 police who entered with keys they took from down  
7 on the second floor.

8 That statement was tantamount to saying  
9 the defendant had no more access to the apartment  
10 than anyone else without keys, that, as with the  
11 police, he had no keys of his own and would have  
12 had to have been given access to the one, quote,  
13 close quote, to whom the opening referred.

14 While a statement such as "you will not  
15 hear evidence that he had access himself," without  
16 mentioning the word keys, might have been within  
17 legal use of favorable suppression rulings stating  
18 that he had no access, others did. That not even  
19 a New York City Police Officer could get in the  
20 apartment without somebody else's keys twisted the  
21 suppression ruling by arguing that the defendant  
22 had no connection to the apartment and had no  
23 means of getting into it other than by someone  
24 else's keys.

25 Defense misused the suppression ruling

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1                   intentionally or not to mislead the jury.

2                   The issue with this trial is defendant's  
3                   supposed dominion and control over the drugs found  
4                   hidden in the two closet safes within the fourth  
5                   floor apartment.

6                   The fact that the defendant had keys to  
7                   the fourth floor still leaves the jury the issues  
8                   of whether he knew about the existence or contents  
9                   of arguably hidden safes and whether he exercised  
10                  dominion and control of the drugs found about one  
11                  of them.

12                  Consequently, introduction of the  
13                  suppressed keys, while adverse to the defendant,  
14                  is not so overwhelmingly admitted. They're  
15                  admissible for the reasons just stated.

16                  MR. KEITH: If I may.

17                  THE COURT: I heard you yesterday, I  
18                  heard you just now. If he loses, you can appeal.

19                  MR. KEITH: I think we necessarily have  
20                  to have a mistrial at this point. This trial has  
21                  evolved into, I submit, a travesty of justice for  
22                  a number of reasons.

23                  Right at the start of the trial I asked  
24                  Your Honor for a ruling with regard to the fact  
25                  that I anticipated the People arguing that

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1           Mr. Green did not move, or something to that  
2           effect, when the officers came in or didn't open  
3           the door for the officers when they were banging  
4           on the door.

5           I think that's a basic constitutional  
6           right to remain silent. The Court of Appeals --  
7           if you are under arrest, you can remain silent.

8           THE COURT: We talked about this. You  
9           watched eloquently, and I didn't adopt your  
10          position. If that's one of the contributors to  
11          the travesty, that's on the record. That can be  
12          appealed, but you will lose on that one also.

13          MR. KEITH: Your Honor is aware that the  
14          Court of Appeals has held that the failure of the  
15          defendant to open an apartment door for the police  
16          does not warrant an inference of criminal intent.  
17          Your Honor never did rule on that. The People  
18          opened on it --

19          THE COURT: We left it to the charge  
20          conference. I told you, I'm sure, that if you  
21          wanted me to tell them that he had no obligation  
22          to open the door, I remember telling you that I  
23          certainly would do that and deferred to the charge  
24          conference, which will be later on this morning;  
25          maybe not very much later on.

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1                   MR. KEITH: Secondly, Your Honor, your  
2 ruling limited my cross-examination of  
3 Detective Romero, Your Honor, and the assistant  
4 district attorney had the benefit of hearing  
5 testimony from this detective ex parte and asked  
6 him specific questions, and he gave you answers.

7                   THE COURT: What are you talking about,  
8 please?

9                   MR. KEITH: In particular, you may recall  
10 that from that hearing, as I previously stated  
11 with regard to the keys, you specifically got him  
12 to admit that the keys were recovered from a  
13 jacket pocket near Mr. Brown and not from  
14 Mr. Brown. But he came in here and still  
15 testified that the keys were recovered from  
16 Mr. Brown. The People elicited testimony when  
17 they both knew that wasn't factually accurate.

18                  THE COURT: I'm tempted to say, "So  
19 what?" There is a constructive possession,  
20 there's in concert possession. Let's assume that  
21 he lied on one of the two items, either in the  
22 Darden hearing with me or in front of the jury.  
23 The point is, as I made yesterday, the jury, under  
24 the rules that bigger, smarter people than I am,  
25 Court of Appeal of the United States says a trial

## =PROCEEDINGS

jury doesn't get a second bite, nor does a defendant in front of the jury get a second bite. They get a bite at Huntley and Wade, but not physical evidence suppression hearings, nor Darden hearings. If this is contribute to the litany of small contributors, I think you're so far 0 for 3.

MR. KEITH: Obviously, Your Honor, that's your opinion. I feel that Your Honor is limiting my cross-examination of Detective Romero. Again, we know that he and Assistant District Attorney Berland prepared an Affidavit to get a search warrant, and in the Affidavit, they described certain things.

They described how officers went to every door on the third floor and then up to the fourth floor, and then at trial, he testifies as to something different. The People elicited that testimony. Again --

THE COURT: That's still on the record for you to do anything you can do with it.

MR. KEITH: You've limited my cross-examination and did not allow me to question him with regard to the officer's activities on the third floor. Your Honor, we have already heard testimony from both detectives. This ruling

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1 clearly changes the posture of the case.

2 When I think back to the motion I made  
3 after the People's opening, asking Your Honor to  
4 dismiss this case, legally at that time with the  
5 People's opening remarks, without any keys on Mr.  
6 Green, legally it was impossible for the People to  
7 prove their case of constructive possession.

8 I gave Your Honor a few cites at that  
9 time. I want to make the record clear that the  
10 Court of Appeals has ruled on this issue on a case  
11 that's almost identical, actually more egregious  
12 than the situation here, People V Headley 74  
13 New York 2nd at 858.

14 In Headley, as I tried to explain before,  
15 and as I'm going to explain again, the door was  
16 not open. It was a search warrant execution. The  
17 police officers banged on the door 25 times,  
18 according to the decision, three men were found in  
19 the living room in that apartment. Weapons,  
20 drugs, and money were found concealed in a metal  
21 box on a table.

22 Now, the defendant, Headley, he was found  
23 hanging out of the window. And near Headley  
24 there was a loaded gun, open jacket pocket with  
25 over \$2,000. There was a machine gun on the

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PROCEEDINGS

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1 floor, gun found between the mattress and  
2 bedspring in the room, and drug paraphernalia,  
3 three scales, grinder, sifter, and a package of  
4 pyramid paper. In a bedroom closet, a leather  
5 tote bag that contained cocaine and marijuana and  
6 two more loaded guns and two holsters.

7 The Court of Appeals, Your Honor, held  
8 that the failure of the defendants to open the  
9 door does not amount to an inference of criminal  
10 intent, and that the evidence in this case does  
11 not establish that the defendant had actual or  
12 constructive possession of the drugs or weapons  
13 that were found in the closed container.

14 There are a number of cases that follow  
15 immediately, in particular People V Edwards, 206,  
16 Appellate Division 2nd 597. In that case, the  
17 location was described as a narcotics' factory.

18 In People V Pedro Encarnacion, the  
19 location described as a working apartment. In the  
20 cases, the defendant was found in that location  
21 similar to Mr. Green.

22 Here, you suppressed the keys that he had  
23 on his person, and there's nothing else that  
24 connects Mr. Green to that location or the  
25 narcotics that were found. I think Your Honor

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1           should likely rule that the case is just legally  
2           impossible.

3           There's also People V Thomson, 214,  
4           Appellate Division 2nd 762. People V Sally 2001  
5           WL 1607761. Also a Law Journal cite, October 12,  
6           2001, Page 20, Column 2. The Court of Appeals in  
7           People V Pierson, 75 New York 2nd, Page 1001.  
8           People V Swang 241, Appellate Division 2nd at 695.  
9           I do have copies for the People and for Your  
10          Honor.

11           Your ruling today creates a slight  
12          logistical problem for me.

13           THE COURT: What's that?

14           MR. KEITH: I do have witnesses that I  
15          would like to bring forth. One of my witnesses  
16          has a child that has Down's Syndrome and will not  
17          be available today, but I believe he will be  
18          available to testify on Monday morning. I believe  
19          there will be a second witness. Not sure about  
20          that at this point.

21           THE COURT: So, we'll do the People's  
22          witness -- we'll wait until Monday. I assume the  
23          witness will be here on Monday, no issue about  
24          that. The witness can arrange the situation to be  
25          available Monday?

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PROCEEDINGS

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1 MR. KEITH: Yes.

2 THE COURT: Let me think whether I will  
3 be in this room --

4 MR. BERLAND: You Honor, as to the  
5 witness, Mr. Keith did not provide any names of  
6 anyone who might testify. In fact, he indicated  
7 that no one would testify. I ask for an offer of  
8 proof or have the information over the weekend so  
9 I can do my investigation.

10 THE COURT: You can be sure they're not  
11 character witnesses.

12 MR. KEITH: He can be pretty sure of  
13 that. Your Honor's ruling specifically precludes  
14 Mr. Green from testifying. Certainly not going to  
15 open that door.

16 THE COURT: You made that jump long ago,  
17 and it had to do with the Sandoval ruling rather  
18 than the last ruling.

19 MR. KEITH: Your Honor, I provided him  
20 with the name, address, and date of birth of the  
21 anticipated witness.

22 THE COURT: Fine. Bring them in.

23 COURT OFFICER: Jury entering.

24 THE COURT: Good morning. You heard me  
25 say some things concern you, some things don't

~~ROMERO - REDIRECT - PEOPLE~~

1 concern you. During a trial, testimony admissible  
2 under circumstances, it changes. You will hear  
3 Detective Romero recalled. Do not speculate about  
4 why anything was not done early. Simply not of  
5 your concern. You will evaluate accuracy and  
6 credibility when it's exposed to you.

7 Recall Detective Romero.

8 COURT OFFICER: Witness entering.

9 THE CLERK: Detective, you are still  
10 under oath.

11 THE COURT: Go ahead.

12 REDIRECT EXAMINATION BY

13 MR. BERLAND:

14 Q. Good morning.

15 A. Good morning.

16 Q. On November 1, 2007, did you recover any keys  
17 from the defendant, Edward Green?

18 A. Yes, I did.

19 Q. You've been handed what has been marked for  
20 identification as People's Exhibit 28.

21 A. Yes. These are the keys recovered from  
22 Mr. Green at the time of the arrest.

23 Q. From where did you recover the keys?

24 A. They were clipped onto his belt.

25 Q. Is there a clip on that?

ROMERO - REDIRECT - PEOPLE

1 A. A Carabiner clip right here (indicating).

2 Q. Approximately how many keys recovered?

3 A. Probably in excess of 25 or more.

4 Q. Are the keys in the same condition or  
5 substantially the same condition as they were when you  
6 recovered them on November 1, 2007?

7 A. Yes, they are.

8 MR. BERLAND: Your Honor, at this time, I  
9 ask that the keys be received into evidence.

10 THE COURT: Anything beyond what has been  
11 said already?

12 MR. KEITH: Actually, I'd like to take a  
13 look at them, that's all.

14 THE COURT: Certainly.

15 (Handing.)

16 THE COURT: Anything beyond what has been  
17 said already?

18 MR. KEITH: No.

19 THE COURT: Admitted over objection. Go  
20 ahead.

21 MR. KEITH: May I ask a couple of voir  
22 dire questions?

23 THE COURT: Sure.

ROMERO - VOIR DIRE - DEFENSE

1 VOIR DIRE EXAMINATION BY

2 MR. KEITH:

3 Q. Detective Romero, who found the keys?

4 A. I took them off his belt at the time of  
5 arrest, sir.

6 MR. KEITH: I will save the rest for  
7 cross-examination. I believe I object to the  
8 entry of the keys.

9 THE COURT: They're received.

10 MR. BERLAND: I believe I misspoke.

11 They're People's Exhibit 29, not 28.

12 THE COURT: All right. What else?

13 CONTINUED REDIRECT EXAMINATION BY

14 MR. BERLAND:

15 Q. Did the keys open the room to any of the rooms  
16 in 451 Lenox Avenue?

17 A. They opened the apartment on the fourth floor,  
18 Apartment 2 -- Apartment 1 on the second floor, and  
19 also the outer door to the building.

20 Q. Do you know if they opened the laundromat?

21 A. I believe they worked on the outer locks.

22 Q. So, the keys that were clipped to the  
23 defendant's waist opened the fourth floor stash room?

24 A. Yes.

25 MR. KEITH: Objection to the

YVETTE PACHECO SENIOR COURT REPORTER

ROMERO - RECROSS - DEFENDANT

1 characterization as a stash room.

2 THE COURT: Yes. I think it's  
3 unnecessary. The topic is fine, but the question  
4 is eradicated from your memory.

5 Q. Did the keys open the fourth floor door?

6 A. Yes, they did.

7 MR. KEITH: I missed it.

8 Q. Did the keys open the door to the fourth floor  
9 apartment?

10 A. Yes. To the apartment where Mr. Green was,  
11 yes.

12 MR. BERLAND: Nothing further.

13 THE COURT: Mr. Keith.

14 RECROSS-EXAMINATION BY

15 MR. KEITH:

16 Q. Good morning.

17 A. Good morning, sir.

18 Q. Please describe to the ladies and gentlemen of  
19 the jury the circumstances under which the keys were  
20 recovered.

21 A. At the time of arrest --

22 Q. "The time of arrest," meaning when he was  
23 handcuffed?

24 A. Yes, sir.

25 Q. This was in the hallway in front of the

ROMERO - RECROSS - PEOPLE

1 apartment on the fourth floor?

2 A. No, sir. Inside the apartment he was  
3 handcuffed.

4 Q. So, while in the apartment, he was handcuffed.  
5 Then what happened?

6 A. Correct. The keys were removed. Because of  
7 the size of the keys, they were removed from the belt.

8 Q. You removed the keys?

9 A. Yes, and put them on the couch.

10 Q. You did what with them?

11 A. Put them on the couch.

12 Q. Did you have a conversation with Mr. Green  
13 after that?

14 A. Very brief, sir.

15 Q. Did you ask him why he had so many keys?

16 A. I believe so.

17 Q. What did he say?

18 MR. BERLAND: Objection.

19 THE COURT: Sustained.

20 Q. Didn't he tell you that he was --

21 MR. BERLAND: Objection.

22 THE COURT: Sustained.

23 Q. Did he tell you he was the manager of the  
24 laundry?

25 MR. BERLAND: Objection.

ROMERO - RECROSS - DEFENSE

1 THE COURT: Sustained. Disregard it.

2 Q. Detective Romero, with the keys, isn't it true  
3 that you then tried to see where the keys fit?

4 A. Not at that time. Later on I did.

5 Q. Later on you did?

6 A. Yes.

7 Q. Did the keys fit some of the apartments?

8 A. I tried it on the fourth floor, the second  
9 floor, and the outer door, yes.

10 Q. So, it fit some of the other apartments?

11 A. No -- yes, I checked the second floor  
12 apartment. That was the only other apartment, other  
13 than the fourth floor, I checked.

14 Q. You didn't check the third floor apartments  
15 with the keys?

16 A. No.

17 Q. On the third floor, was just the keys  
18 recovered from the second floor that you used to check  
19 those apartments?

20 A. Because those were the keys I was worried  
21 about for getting a search warrant, sir.

22 Q. So, correct me if I'm wrong. You get a search  
23 warrant for the second floor apartment, you find keys  
24 there, and you use those keys to check every apartment  
25 in the building; that's basically what you did?

ROMERO - RECROSS - DEFENSE

1           A. After we made entry into the fourth floor  
2 apartment --

3           Q. I'm not saying when. That's what you did  
4 ultimately, right?

5           A. Yes. Uh-huh.

6           Q. Now, you go up to the fourth floor, you find a  
7 fair amount of drugs, you find Mr. Green with a bunch  
8 of keys, and you do not check every apartment to see  
9 where the keys fit?

10          A. The only reason I checked the other keys on  
11 the third floor was, when I went down to get the search  
12 warrant, I knew I would be asked if it opened any other  
13 apartments. So, I didn't check, no. It would have  
14 taken a long time to check all the keys in every  
15 apartment.

16          Q. The keys worked for the laundromat, to gain  
17 entrance into the laundromat?

18          A. I believe there's keys on there for the outer  
19 locks of the metal gates. That's the only keys I  
20 tried.

21          Q. Now, I believe you also testified that there  
22 was a key or keys for the second floor apartment where  
23 Mr. Brown was arrested, the other gentleman?

24          A. Yes, where one of the keys worked at.

25          Q. Are you sure about that?

YVETTE PACHECO SENIOR COURT REPORTER

ROMERO - RECROSS - DEFENSE

1 A. Believe so. That I checked back at the  
2 office, because that lock had already been removed.

3 Q. With the keys you have now, you also have the  
4 lock from the second floor?

5 A. Right.

6 Q. I'd like you to show me which key fits the  
7 second floor.

8 A. That was back in November. I don't know which  
9 key it is.

10 MR. KEITH: Your Honor, could we have the  
11 evidence open to see if there is a key that fits  
12 the second floor lock?

13 THE COURT: Sure.

14 MR. KEITH: We need the second floor  
15 lock.

16 THE COURT: It was never seized?

17 THE WITNESS: No, sir, because the door  
18 was opened.

19 Q. Didn't I just ask whether or not we had the  
20 lock for the second floor?

21 A. That was the lock. We have the keys from the  
22 second floor and the lock from the first floor. We  
23 don't have the second floor lock. I made a mistake.

24 THE COURT: What's the first floor lock?

25 THE WITNESS: The second floor lock that

ROMERO - RECROSS - DEFENSE

1 he's talking about is Apartment 2. Apartment 1 on  
2 the second floor, which Mr. Brown was arrested in,  
3 we did not take that lock because that door was  
4 open when we made entry.

5 Q. So, basically, we can't unequivocally show the  
6 jury that any of the keys worked for the second floor  
7 lock; isn't that fair to say?

8 A. No. It worked on the day of the arrest,  
9 though.

10 Q. I'm saying right now.

11 A. Correct, sir.

12 Q. Thinking back to what happened inside the  
13 apartment on the fourth floor, now, you say that you  
14 got these keys from Mr. Green. Did you also recover  
15 money from Mr. Green?

16 A. No. As I told you yesterday, he had money on  
17 him and I put it in the envelope with all his other  
18 property.

19 Q. Right. Were you the --

20 A. No, sir. No.

21 Q. Do you know who was?

22 A. Detective McLaughlin, I believe.

23 THE COURT: If there is such a person, I  
24 don't know him. If there is a relationship, it's  
25 hundreds of years ago in a place far away, and he

ROMERO - RECROSS - DEFENSE

1                   might even spell his name incorrectly. But we're  
2                   not going to do the Hatfields and the McCoy thing.

3                 Q. Detective Romero, without question, there has  
4                   been some passage of time, and your memory may have  
5                   faded. Are you certain that you are the person that  
6                   found the keys that were on Mr. Green?

7                 A. Sir, that -- yes. I took it off his belt  
8                   because of the size of keys and put them on the couch.

9                 THE COURT: If by "found" you mean "see,"  
10                  I don't know if anybody can know who saw it first.  
11                  If "find," you mean "removal" --

12                 MR. KEITH: Removal would be more  
13                  appropriate, Your Honor.

14                 A. Yes, correct. Correct.

15                 Q. Now, obviously, based on the questions that  
16                  you heard in the case and your experience, you know how  
17                  important it is to be accurate and complete in your  
18                  paperwork; would you agree?

19                 A. Yes, sir.

20                 Q. And in this case, there are different items  
21                  found by different detectives, and when you prepare a  
22                  voucher, it's your responsibility and the other  
23                  detectives' involved responsibility to be as accurate  
24                  as possible; would that be fair to say?

25                 A. Yes, sir.

ROMERO - RE CROSS - DEFENSE

1 Q. Generally speaking, with regard to a voucher,  
2 there is an indication of who is the finder of the  
3 property; wouldn't that be fair to say?

4 A. Yes, sir.

5 Q. In this case, with your experience as a  
6 detective, you and your fellow experienced detectives  
7 were careful to indicate who the finder of the  
8 particular item was; would that be correct?

9 A. Yes, sir.

10 Q. For example, you indicated that the money was  
11 found by Detective McLaughlin. I assume you refreshed  
12 your recollection and looked at the property voucher?

13 A. No.

14 Q. You have an independent recollection of that  
15 particular thing?

16 A. The money was on him at the time of the  
17 arrest. I left it in the pocket. Detective  
18 McLaughlin, when he transported it, he vouchered the  
19 property, the money.

20 Q. So, you just happen to remember that, or did  
21 you look at the voucher?

22 A. That's how it happened, sir.

23 Q. I'm asking you, how is it that you -- it's a  
24 relatively insignificant thing. How do you happen to  
25 recall that? Did you refresh your recollection by

YVETTE PACHECO SENIOR COURT REPORTER

ROMERO - RECROSS - DEFENSE

1 looking --

2 A. I did look over all the vouchers.

3 Q. Excuse me?

4 A. I looked over all my paperwork, but that was  
5 the course of events.

6 Q. With regard to the keys, isn't it correct,  
7 sir, that you were not the person that removed these  
8 keys from Mr. Green?

9 A. As I told you before, I took them off his belt  
10 because of the size. It could be used as a weapon.  
11 Put them on the couch. Detective Hernandez then took  
12 custody of all the property because I was down in  
13 court. When they recovered -- Detective Hernandez is  
14 the recovering officer on the vouchers because he was  
15 there right with me.

16 Q. So, you anticipated where I was going.

17 A. I know exactly your questions.

18 THE COURT: It's more comfortable if you  
19 wait for the question rather than answer what you  
20 expect to be calling for.

21 Q. You admit again there's documentation that is  
22 inconsistent with your testimony?

23 MR. BERLAND: Objection.

24 THE COURT: Sustained. You want to point  
25 out a document, that's fine. Do not do it that

YVETTE PACHECO SENIOR COURT REPORTER

ROMERO - RECROSS - DEFENSE

1 way, please. Go ahead.

2 MR. KEITH: May this be marked  
3 Defendant's G for identification.

4 (Defendant's Exhibit G was marked for  
5 identification.)

6 THE COURT: Just read it to yourself.  
7 When you are finished, look up.

8 A. (Complying.)

9 Q. Look at what has been marked Defendant's G for  
10 identification. What is that?

11 A. This is a copy of the voucher for the keys.

12 Q. And it's correct that on the voucher, it  
13 indicates that Detective Hernandez is the finder of the  
14 property and not yourself?

15 A. Yes, sir.

16 MR. KEITH: I offer it as a prior  
17 inconsistent statement.

18 THE COURT: Any objection?

19 MR. BERLAND: No, Your Honor.

20 THE COURT: It's in.

21 (Defendant's Exhibit G was received in  
22 evidence .)

23 THE COURT: It's available to you. Same  
24 thing you've heard the testimony being, you can  
25 use this for whatever value you wish to use it.

ROMERO - RECROSS - DEFENSE

1 Q. Detective Romero, in your preparation for this  
2 trial, would it be fair to say that you've had a few  
3 conversations with Assistant District Attorney Berland?

4 A. Yes, sir.

5 Q. Certainly, one of the concerns was how to  
6 connect Mr. Green to the drugs that were recovered in  
7 the fourth floor apartment; wouldn't that be fair to  
8 say?

9 A. No, sir.

10 Q. How is that not a concern?

11 A. He was in the apartment at the time of the  
12 arrest.

13 Q. And you, of course, had conversation with  
14 ADA Berland about the People's burden of proof?

15 A. We just went over the facts of the case, sir.

16 Q. Detective Romero, isn't it correct that when  
17 you were getting pedigree information from Mr. Green,  
18 or when you looked at his identification, you  
19 recognized that he did not live at that location?

20 MR. BERLAND: Objection.

21 THE COURT: Two predicates in the  
22 question, neither of which have answers from  
23 yesterday's predicate. Namely, that he looked at  
24 both of them, is what you said, the wallet and the  
25 identification. The topic is fine. Whatever we

ROMERO - RECROSS - DEFENSE

1 did yesterday is fine.

2 Go ahead.

3 Did you see a wallet? Did you see an  
4 identification?

5 THE WITNESS: As I said yesterday, no.

6 Q. The information that you put on your  
7 paperwork, the Bronx address that you put down for  
8 Mr. Green, where did you get that information from?

9 A. As I told you yesterday --

10 THE COURT: He said yesterday, because he  
11 was down at the district attorney's office,  
12 somebody else did that. I don't think he said who  
13 it was. Somebody else filled out the on-line  
14 booking sheet.

15 We're here because --

16 (Whereupon, a sidebar conference was held  
17 on the record out of the hearing of the jury.)

18 MR. KEITH: I move again for a mistrial.  
19 Your Honor, please let the witness answer the  
20 question. You did not have to interject in that  
21 manner.

22 THE COURT: Not if you can remember what  
23 happened yesterday. I will not take any more time  
24 than is necessary going over inaccurate, improper  
25 predicates to yesterday. You had two predicates

YVETTE PACHECO SENIOR COURT REPORTER

ROMERO - RECROSS - DEFENSE

1           in the question, both of which you had gone over  
2           with this witness significantly. There's no  
3           reason to go forward with that question or that  
4           topic.

5           MR. KEITH: Well, I think the appropriate  
6           remedy would have been to sustain the objection  
7           and force me to rephrase the question, not in  
8           the -- I move from a mistrial.

9           THE COURT: Nonsense. Denied.

10           (Whereupon, the sidebar conference  
11           concluded and the proceedings continued in open court  
12           as follows:)

13           Q. Detective, I'm sorry, you've been a detective  
14           for how long?

15           A. I've been a detective since 1997; 11 years,  
16           sir. Will be 11 years in November.

17           Q. You, of course, have been trained in some  
18           forensic?

19           A. Yes, sir, I have.

20           Q. With regard to any of the items, I guess it  
21           would be fair to say that there was no forensic tests  
22           done to the extent there was no attempt to find any ID  
23           or fingerprints, anything to that extent?

24           A. No, sir, there was not.

25           MR. KEITH: No further questions.

YVETTE PACHECO SENIOR COURT REPORTER

ROMERO - REDIRECT - PEOPLE =

1 THE COURT: Anything else, Mr. Berland?

2 MR. BERLAND: Yes, Your Honor.

3 REDIRECT EXAMINATION BY

4 MR. BERLAND:

5 Q. Detective Romero, that's Defendant's  
6 Exhibit G. On the bottom, there is a remarks section.  
7 Can you read that? It's in evidence.

8 A. "Above removed from defendant at the time of  
9 arrest at 5781, has two keys that fits two locks on the  
10 fourth floor of 451 Lenox Avenue."

11 Q. Item No. 1, what does that refer to?

12 A. The key chain.

13 Q. These keys?

14 A. Yes.

15 Q. Detective Romero, you didn't look for DNA or  
16 fingerprints on the keys?

17 A. No, sir.

18 Q. Why not?

19 A. Wasn't necessary.

20 Q. Why not?

21 A. We only do fingerprints and DNA when we don't  
22 know who possesses the property.

23 Q. How do you know who possessed this property?

24 A. It was removed from the defendant.

25 Q. By the way, were there any clothes or personal

ROMERO - RE CROSS - DEFENSE -

1 property inside of the fourth floor room?

2 A. No, sir.

3 MR. BERLAND: Nothing further.

4 THE COURT: Further questions, Mr. Keith?

5 MR. KEITH: Yes, Your Honor.

6 RE CROSS-EXAMINATION BY

7 MR. KEITH:

8 Q. I wasn't referring to keys. I'm talking about  
9 drugs, the safe, the narcotics, paraphernalia. Did you  
10 do any DNA testing or photocopy testing on the items?  
11 The keys were on his waist.

12 A. Still no, sir.

13 Q. Isn't it also correct that with regard to the  
14 Defendant's G in evidence -- don't mean to restate  
15 over -- there's nothing said about any of the keys  
16 fitting the lock on the second floor; isn't that  
17 correct?

18 A. That's correct.

19 MR. KEITH: No further questions.

20 THE COURT: Anything else?

21 MR. BERLAND: No.

22 THE COURT: You're excused.

23 (The witness was excused.)

24 THE COURT: Any other witnesses today?

25 MR. BERLAND: No, Your Honor.

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PROCEEDINGS

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1                   THE COURT: So, we're back to Monday. Be  
2 here at about 9:38 on Monday. On the day you are  
3 asked to decide the case, once you assume certain  
4 things happen, we take a lunch order from you.  
5 You don't pay for it, so it will not be from the  
6 fancy five-star restaurant.

7                   If 14 people show up at 9:45, you will  
8 not be in here until after 10. I'm suggesting  
9 that you come at about 9:38. I will have the  
10 lunch order taken. Get yourself ready, and 9:45  
11 you will be available in the courtroom to do the  
12 last day of the trial. And defense and the  
13 Prosecution arguments will tell me what the law  
14 is. As soon as you get here, the sooner we are in  
15 position to discuss the case.

16                  Don't discuss the case. Don't let  
17 anybody try to influence your judgment in the case  
18 or speak to you about it. The fact that someone  
19 mentions it does not mean somebody will do what  
20 it's required to do. I mention it to each jury in  
21 every case.

22                  Guess what? When I started, there  
23 were 55 Supreme Court judges. Now there are 31.  
24 So, I will be on the 13th Floor with you and this  
25 case in another courtroom on Monday. It's

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PROCEEDINGS

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1                   Room 1317, this building, 13th floor. Fellow who  
2                   will not be there is Carruthers (phonetic). If  
3                   you get disoriented, anybody with a uniform can  
4                   tell you where he is. Very famous fellow.

5                   Please be able to start at 9:45.

6                   (Jurors exit.)

7                   THE COURT: Do we need to discuss  
8                   anything more about the charge conference? Do you  
9                   want to consider felony as a lesser on the first  
10                  count or are you still thinking about that?

11                  MR. KEITH: Your Honor, with regard to  
12                  the second count, the intent to prove, are you  
13                  giving that charge to the jury?

14                  THE COURT: Yes. Yesterday you asked me  
15                  to dismiss it, and I said that --

16                  MR. KEITH: Even in light of the  
17                  testimony today, the keys he had clearly were not  
18                  for the second floor apartment. And the video  
19                  connection, or whatever other connection, is  
20                  somewhat tenuous. I don't think the People can  
21                  make out constructive possession theory or acting  
22                  in concert theory without the keys, without any  
23                  real connection to the second floor.

24                  THE COURT: I disagree, but there's a  
25                  factual issue that you just raised about what the

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PROCEEDINGS

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1                   witness actually said. I sure want to clear it up  
2 before we leave. Not with the witness, but  
3 between you folks and the jury. My recollection  
4 of what he said were the keys on Mr. Green's belt  
5 or key chain opened the second floor door. What  
6 he said is they didn't take the lock, and he  
7 cannot prove it, other than what he said. If I'm  
8 wrong, tell me.

9                   MR. KEITH: He did say that. The voucher  
10 was admitted into evidence and doesn't say  
11 anything about the second floor.

12                  THE COURT: That is not --

13                  MR. KEITH: I understand that.

14                  THE COURT: Motion to dismiss the second  
15 count is still denied. Anything else we need to  
16 do today?

17                  MR. KEITH: What do you anticipate? Are  
18 there going to be any charges I should be aware  
19 of? I know you will charge everything in the  
20 indictment.

21                  THE COURT: The answer is I don't believe  
22 so. I've decided. Most recent trials have been  
23 doing acting in concert charge, constructive  
24 possession out of the CJI, and the basic charge  
25 that I used the last several trials, a trial

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PROCEEDINGS

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1                   judge -- that Judge Marru in Brooklyn has used  
2                   that was given at the summer judicial training  
3                   that I took in June. I no longer use the Goodman  
4                   book charge.

5                   No, there's nothing that you cannot  
6                   anticipate. It's all out of CJI. The only  
7                   variant, if there are answers to the questions I  
8                   have to come up with, but that will not happen  
9                   during the deliberations.

10                  MR. BERLAND: You mentioned the  
11                  consciousness of guilt. We'll ask for that at the  
12                  conference.

13                  THE COURT: This sounds like this is the  
14                  conference. How do you propose that be given to  
15                  the jury?

16                  MR. KEITH: Conscious of guilt because he  
17                  sat there?

18                  MR. BERLAND: Because he ran up into the  
19                  apartment, the door slammed, and then sat there.

20                  THE COURT: Sustained. I will not give  
21                  that. You can argue it. If nobody identified him  
22                  and there are, as we discussed, any number of  
23                  potential people who ran somewhere and slammed  
24                  something, there is no way, so to speak, to pin  
25                  that on Mr. Green.

## PROCEEDINGS

1                   MR. KEITH: With regard to any adverse  
2 inference drawn from the testimony that Mr. Green  
3 did not open the door or that he sat in the  
4 apartment, I don't know what the jury will accept  
5 with regard to that. I would think there is no  
6 adverse inference because he didn't do something.

7                   THE COURT: Berland can argue whatever he  
8 wants about that as a factual matter. If you want  
9 me to say neither Mr. Green nor anybody would be  
10 required under the circumstances to answer their  
11 door, I would be glad to.

12                  MR. KEITH: Please, Your Honor. I don't  
13 think Mr. Berland should be able to argue. With  
14 regard to ADA Berland, I don't think it would be  
15 fair or proper to allow him to argue that there  
16 should be some negative inference drawn because  
17 Mr. Green exercised his constitutional right to  
18 sit there and not do anything.

19                  THE COURT: I wouldn't put in the realm  
20 of constitutional rights, because you are  
21 analyzing it to the right to remain silent after  
22 being arrested and being questioned while you are  
23 in custody. Those two things mandate the giving  
24 of the Miranda warnings and then a decision by an  
25 accused specifically to speak or not.

## PROCEEDINGS

1                   While actions can and often are nonverbal  
2                   communications, Mr. Green was not arrested and  
3                   certainly was not being questioned at the time of  
4                   the knocking and his supposed hearing of the  
5                   knocks and supposed refraining from opening the  
6                   door, the People can argue to the jury that means  
7                   something. I will tell the jury that legally  
8                   there is no law that says he can't do it, and I'll  
9                   do that.

10                  MR. KEITH: Well, he doesn't have to  
11                  respond, and there should be no adverse inference  
12                  drawn from that.

13                  THE COURT: I disagree. We are --

14                  MR. KEITH: That's what the Court of  
15                  Appeals says.

16                  THE COURT: No, it doesn't. It doesn't.  
17                  We're, once again, back to the disagreement.  
18                  There is a way to resolve it, but not between you  
19                  and me.

20                  MR. KEITH: There could not possibly be  
21                  an inference of criminal intent by him sitting  
22                  there. That's what he wants to argue. That's  
23                  part of the problem with this case. He can argue  
24                  it because things are --

25                  THE COURT: In the absence of a better

## PROCEEDINGS

1                   mind than he's got, I'm searching for a similarity  
2                   or an analogy with respect to -- the closest one  
3                   is the missing witness situation where one or both  
4                   sides -- sorry, one side asks that the Court tell  
5                   the jury that they may draw an adverse inference  
6                   as a matter of law, that the law supports this if  
7                   you decide that a party should have called a  
8                   witness.

9                   Oftentimes, however, for the reasons  
10                  contained in the Gonzalez case, the law would not  
11                  support, as a matter of law, that the jury must or  
12                  should draw a certain conclusion, but that never  
13                  prevents the side who wanted the law to support  
14                  them, it never prevents that side from arguing as  
15                  a matter of fact, common sense, et cetera; that  
16                  the witness not being called by that other side,  
17                  the jury should realize that there is something  
18                  strange about that. And the jury factually can  
19                  decide something against the person, but not have  
20                  the law support from that. That's the closest I  
21                  can come to where we are here.

22                  MR. KEITH: Your Honor, I --

23                  THE COURT: I might be intransigent, but  
24                  you will not change my mind. I'm here for a  
25                  while. If you want to talk, go right ahead. I

## PROCEEDINGS

1 will stand here and listen.

2 MR. KEITH: I appreciate your candor,  
3 Your Honor. I'll forge ahead and try to do the  
4 impossible.

5 Your Honor, there is a mixture here of  
6 law, in fact. I think we agree on that. You are  
7 allowing the prosecutor to make arguments and ask  
8 the jury to reach certain conclusions or draw  
9 certain inferences from behavior that the Court  
10 has specifically said you should not draw a  
11 criminal intent.

12 I think you will invite jury confusion  
13 if, when Mr. Berland does his summation, he makes  
14 the argument and then you explain to them that  
15 they are not to draw such an inference. I think  
16 the better practice is to not let ADA Berland make  
17 the argument if Your Honor in turn will instruct  
18 them that he cannot draw the inference.

19 THE COURT: You misunderstood what I said  
20 I would do. It's not that I'm going to tell them  
21 they cannot draw an inference. I will say there  
22 is no constitutional prohibition or penalty to be  
23 gleaned by a person not opening their door.

24 MR. KEITH: So, then you conclude to the  
25 contrary, if that's a word, or you differ from the

1 Court of Appeals, because they're saying that you  
2 cannot draw criminal intent.

3 THE COURT: I'm pummeled by the Court of  
4 of Appeals. I do not disagree with them. The  
5 answer is, no, I'm not saying that. What I'm  
6 saying I said as best I can, with my limited  
7 mental factual and meager experience. If it turns  
8 out your client is convicted of something, I await  
9 my fate when there is an appeal, but I'm  
10 confident.

11 Please mark his card for Part 81 on  
12 Monday. Please put him on the trial list for that  
13 part.

14 -----  
15 SUPREME COURT OF THE STATE OF NEW YORK  
16 COUNTY OF NEW YORK PART-93

17 THE PEOPLE OF THE STATE OF NEW YORK

18 -against-  
19 TRIAL

20 EDWARD GREEN,  
21 Defendant

22 September 15, 2008

23 B E F O R E: HONORABLE E. MCLAUGHLIN, JSC  
24

25 (Appearances as previously mentioned.)  
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1                   THE CLERK: Case number one on the  
2 Part 93 calendar, Edward Green.

3                   MR. KEITH: I want to make sure I'm  
4 clear. With regard to the second, third and  
5 fourth counts of the indictment, that covers both  
6 the second floor and the fourth floor?

7                   THE COURT: Yes.

8                   MR. KEITH: And you will give a credible  
9 charge?

10                  THE COURT: Absolutely.

11                  It's just the four charges on the  
12 indictment. Do you want me to tell them about  
13 your client not testifying?

14                  MR. KEITH: Absolutely.

15                  THE COURT: Jury entering.

16                  THE CLERK: Case on trial continues.  
17 People of the State of New York versus  
18 Edward Green. All parties and jurors are present  
19 and properly seated.

20                  THE COURT: Anything else from the  
21 People?

22                  MR. BERLAND: The People rest.

23                  THE COURT: Mr. Keith, anything from the  
24 defense?

25                  MR. KEITH: No, Your Honor.

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PROCEEDINGS

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1                   THE COURT: We will now go to the  
2 summations. If you remember the order of the  
3 trial, by law, the defense goes first, so we'll  
4 hear from Mr. Keith.

5                   MR. KEITH: May we approach?

6                   THE COURT: Yup.

7                   (Whereupon, a sidebar conference was held  
8 on the record out of the hearing of the jury.)

9                   THE COURT: I thought by the lack of --  
10 it's my fault, I don't see the need to hear the  
11 motion for the third time. The evidence is  
12 finished. There's no defense case. I think if  
13 you make a motion at the end of the People's case  
14 and at the end of the entire evidence, which is  
15 identical, it would be identical to what has been  
16 made twice before. Let's assume you made it and  
17 assume I denied it.

18                  Is that an adequate record for your  
19 purposes?

20                  MR. KEITH: No. Can I add a little bit?

21                  THE COURT: Why don't we do it later. Is  
22 that accurate for your purposes?

23                  MR. KEITH: Your Honor, I don't know if  
24 legally that's the right way to do things. I want  
25 to make sure the record is clear and all his

## PROCEEDINGS

1 rights are preserved. I think I have to make the  
2 motion now.

3 THE COURT: Whatever you feel like doing.  
4 It's Monday morning and whatever you want to say.

5 MR. KEITH: Now that we have heard all of  
6 the evidence in the case, I think it would be  
7 appropriate for Your Honor to enter a trial order  
8 of dismissal.

9 While Your Honor has been privy to  
10 information that the jury hasn't heard, I know  
11 Your Honor is acutely aware of the fact that  
12 there's been three different versions of what  
13 happened back on November 1, 2007. I submit that  
14 it's impossible to reconcile the different  
15 versions of what supposedly happened back on that  
16 date. I believe I got the phrase "there's only  
17 one truth" from Your Honor. I would think that  
18 your conscience has to be somewhat troubled by the  
19 testimony of Detective Romero and the differences  
20 in the Grand Jury testimony, the affidavit for the  
21 search warrant, the testimony that he gave you in  
22 that Darden hearing and what he said in the  
23 courtroom to this jury. This case is nothing  
24 short of an outrage. The fact that ADA Berland  
25 has had his hands all over the case from the

## PROCEEDINGS

beginning to the end and brought this forth in this court in this manner. Your Honor has already ruled that the behavior was illegal and now for them to come in and add more to it, Your Honor should bring this to an end right now.

THE COURT: Do you want to say anything?

MR. BERLAND: I rest on the record, Your Honor.

THE COURT: This situation in the posture in which the legal system in the year 2008 is, really does not permit me to do a thing, since 35NYS has been the Brown case which says judges at my level shouldn't be granting trial orders of dismissals because it removes from the prosecution any objection of appeal. The case would be a dead duck at that point.

Perhaps your assessment of my instinct and my reaction is relatively if not largely accurate. I was afraid after the Darden hearing of saying that the entire thing had to be dismissed since I don't get to act, however, on my own personal feelings now or whenever on whim or caprice, but I'm required to figure out as best I can with my humble mentality what the law is and having been implored and impleaded not to toss the

## PROCEEDINGS

1 case out of pique perhaps or an assessment of  
2 credibility, I didn't think and researched and  
3 that's why I had to invoke in my opinion the rule  
4 regarding standing that oftentimes causes people  
5 to be mystified, namely that there could be a  
6 recognized error, perhaps intentional error or  
7 misstatement, defraud or deceit, et cetera, et  
8 cetera, et cetera, et cetera all of resulting in  
9 suppression of evidence, but that the person on  
10 trial doesn't get the benefit of it. It's called  
11 the standing rule. Of course, we're going to  
12 review this if there is a conviction, as I assume  
13 all three of us, so the motion is denied.

14 MR. KEITH: Your Honor, briefly, with  
15 regard to the Brown decision and the rules  
16 enunciated on the 290, I believe Your Honor can  
17 reserve decision and the People would still have  
18 the right to appeal.

19 THE COURT: That's absolutely correct,  
20 but it's correct as a matter of law, not on facts.  
21 If a jury decides that there is a connection, it's  
22 again, virtually impossible for me, a trial judge,  
23 to say that as a matter of law there is no basis  
24 connecting your client to whatever he may be found  
25 guilty of. That really is an Appellate issue

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SUMMATION - DEFENSE

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1                   properly brought by the defendant. Let's wait  
2                   until we get there. If I were to say the word  
3                   reserved, undoubtedly I'll hear the argument a  
4                   fourth time and I choose not to do it, so the  
5                   motion is denied.

6                   (Whereupon, the sidebar conference  
7                   concluded and the proceedings continued in open court  
8                   as follows:)

9                   THE COURT: In a moment, we're ready for  
10                  Mr. Keith's summation.

11                  MR. KEITH: Good morning, ladies and  
12                  gentlemen of the jury. I want to start by  
13                  thank you for your time and attention in this  
14                  case.

15                  I feel like an apology is in order  
16                  because when we started this last Tuesday, I  
17                  certainly do not think any of us anticipated that  
18                  it would take as much of your time and attention  
19                  as it has, but I also think that even though we  
20                  have only heard testimony from two witnesses, I  
21                  would imagine that this has been somewhat of a  
22                  learning experience for all of us and possibly  
23                  even a wake-up call.

24                  I implore you, I want you to deliberate  
25                  and discuss this case amongst yourselves. When

---

SUMMATION - DEFENSE

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1 I'm done, of course, ADA Berland will make his  
2 arguments and then the judge will instruct you on  
3 the law.

4 You all promised that you would  
5 deliberate and talk about this case and I  
6 certainly want you to do that. This is an  
7 experience I think you should also share with  
8 family and friends. I want you to discuss and  
9 talk about how intense, just testimony from two  
10 witnesses, how intense the assistant district  
11 attorney was and is as the evidence certainly  
12 revealed.

13 He has been a part of this case from the  
14 very beginning. This is his case. This is the  
15 way it was presented to you. He and his very  
16 experienced detective, Detective Romero in  
17 particular, convinced the judge to sign a search  
18 warrant, actually search warrants.

19 I think it's pretty evident that the  
20 initial search warrants were based on bad  
21 information. The description of the building was  
22 totally wrong. I want you to talk about that,  
23 think about that. The case started with bad  
24 information before November 1st and continued with  
25 bad information on that date and since then. As I

---

SUMMATION - DEFENSE

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1           said, the initial bad information was the wrong  
2           description of the layout of the building.

3           Now, what I'm saying now is not evidence  
4           and what the prosecutor said in the opening  
5           statement is not evidence. What he's about to say  
6           in the summation is not evidence, but you may  
7           recall he said something about the building was  
8           converted into an SRO.

9           You can take a look at the pictures, and  
10          there was no recent conversion. The building has  
11          been the way it is for a long period of time. The  
12          picture makes it very clear that there's no sign  
13          of any recent construction, any new construction,  
14          anything to that effect.

15          The other bad information that came out  
16          on November 1st and it is an important piece of  
17          information, is the keys that they got from the  
18          second floor. The assistant district attorney and  
19          the officers made it sound as though those keys  
20          were gotten from Steven Brown, but a precise  
21          statement is the keys were in a jacket next to  
22          where Steven Brown was sitting.

23          We heard nothing else about this jacket,  
24          whether or not it fit Steven Brown, whether or not  
25          it was a man's jacket or woman's jacket, nor any

---

SUMMATION - DEFENSE

---

1 identification belonging to Steven Brown. I think  
2 when there was some Q and A about that during the  
3 trial, the judge may have interjected and said  
4 something about constructive possession or  
5 something to that effect, but none of that has  
6 been fleshed out.

7 The precise facts are that the detective  
8 found some keys in a jacket next to this man  
9 Steven Brown, and with those keys, ladies and  
10 gentlemen, I think the evidence is clear, they  
11 went to every apartment in this building.  
12 Detective Romero would like us to believe that  
13 they went straight up to the fourth floor  
14 apartment and then checked the other apartments.

15 Ladies and gentlemen, I ask you to use  
16 your common sense. These detectives did what they  
17 wanted to do on that date. They went to every  
18 apartment. Let's talk about first grade detective  
19 Alfred Hernandez, second grade detective Anthony  
20 Romero. The evidence and lack of evidence that  
21 was presented to you.

22 Ladies and gentlemen, I submit to you  
23 that the case is a very weak case. It's built on  
24 reasonable doubt. It certainly appears that what  
25 happened on November 1st, these detectives and ADA

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SUMMATION - DEFENSE

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1                   Berland made a rush to judgment and made some  
2 decision that day and obviously affects my client,  
3 Mr. Edward Green. There was absolutely no  
4 investigation done as to who were the apartments  
5 were leased to.

6                   I don't have the burden of proof here.  
7 You can't shift it to me and force me to do  
8 things. Mr. Green has no burden of proof. The  
9 law says they have the burden of proof. They have  
10 to prove the elements of the crimes charged beyond  
11 a reasonable doubt. You can't shift it.

12                  Edward Green certainly did not live at  
13 451 Lenox Avenue. Now, I know the district  
14 attorney, when he stands up here, he will wave the  
15 keys around and try to make his case out and  
16 suggest that because Mr. Green had keys to just  
17 about everything in that building, that somehow he  
18 has the combination to the locks in the safes and  
19 therefore the drugs are his or something to that  
20 effect. Speculation, ladies and gentlemen.

21                  When I finish, you will see that almost  
22 each and every piece of critical information in  
23 this case has been rebutted by the detectives' own  
24 testimony. The Polaroid pictures. Here, in 2008,  
25 I am surprised that you can still get film for a

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SUMMATION - DEFENSE

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1                   Polaroid camera. When was the last time somebody  
2                   used a Polaroid camera? Are they serious? What  
3                   about any forensic work, ladies and gentlemen,  
4                   DNA, fingerprints?

5                   It appeared to me that Detective Romero  
6                   was almost annoyed because in his mind, oh, the  
7                   guy is in the room, clearly he's guilty. In his  
8                   mind, there's nothing else to be done. What  
9                   happened with these very experienced detective?  
10                  This is 2008. The technology is here. There's no  
11                  excuse.

12                  Now, during this trial, there certainly  
13                  was some laughter and funny moments. Certainly  
14                  the laughter is good to counteract the stress, but  
15                  ladies and gentlemen, the charges are very serious  
16                  charges. These are very serious accusations made  
17                  against Mr. Green. All the laughing and joking is  
18                  over.

19                  We are in the Supreme Court of New York  
20                  County, and the first count of the indictment  
21                  charges him with Criminal Possession of Controlled  
22                  Substance in the First Degree, the highest and  
23                  biggest drug charge in New York State. This is  
24                  the way the case is handled and presented to you.  
25                  Please deliberate and talk about this case. Talk

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SUMMATION - DEFENSE

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1                   about how easy it is to be accused of a very  
2                   serious crime.

3                   I want you to think about the rush to  
4                   judgment and the conclusions and deliberations  
5                   that were made back on November 1, 2007. Think  
6                   about it, ladies and gentlemen. You can go to  
7                   someone's house, someone's apartment or you could  
8                   be working and there is a heat sealer on the  
9                   floor, a digital scale.

10                  By the way, I cook a little bit, my wife  
11                  does some cooking. I don't think I've ever seen a  
12                  digital scale. How are we to assume, Mr. Green,  
13                  even if he were sitting right next to a digital  
14                  scale, would know what it is?

15                  If I understood the testimony correctly,  
16                  they saw a digital scale on a rack and the other  
17                  scales were recovered from the inside the closet.  
18                  On a glass top table, there was testimony that  
19                  there was cocaine residue. I think we all agree  
20                  that the more precise language, if there was some  
21                  white powder on the table, would have been to say  
22                  white powder.

23                  But, ladies and gentlemen, there's the  
24                  Polaroid pictures, and I submit, if you look  
25                  carefully at the pictures, you do not see any

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SUMMATION - DEFENSE

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1 white powdery substance. So the arguments or  
2 statements that were made to get the search  
3 warrant, that were made in the opening statement,  
4 that were made throughout the trial about cocaine  
5 residue, it really means nothing. It really means  
6 nothing.

7 I mean, I'm asking you not to accept the  
8 testimony from these detectives because you don't  
9 know what to believe, you do not know what the  
10 truth is. There are too many versions coming from  
11 these guys.

12 With respect to those items that were in  
13 the room with Mr. Green, the heat sealer on the  
14 floor, the digital scale that I believe was on the  
15 TV rack, this glass top table with the white  
16 powder on it, I also believe there was a box of  
17 Ziploc sandwich bags on the counter that looks  
18 like a fireplace, a picture of those items are  
19 also in evidence, People's Exhibit 21.

20 THE COURT: What do those items mean?  
21 You can look at the picture. You can see the box  
22 with the Ziploc bags. I don't see any white  
23 powder. You can look at it for yourself. It's in  
24 evidence. Now, there was testimony that when the  
25 police got to this location, before they executed

## SUMMATION - DEFENSE

1                   the search warrant, that they sent -- I believe  
2                   they described it as a walk-on to the building.  
3                   According to what the detective said, somebody  
4                   came out of the building and then they went in,  
5                   they made their move.

6                   Nothing else was said about the person  
7                   that left the building. They didn't get any  
8                   identification from the person. At least there  
9                   was no testimony about that. It appears to me  
10                  that under the circumstances of this case, with  
11                  them having a warrant at that time, they should  
12                  have at least stopped the person and did some sort  
13                  of investigation. There was nothing said about  
14                  that.

15                  Ultimately, they get in the building and  
16                  according to the detective, the first team rushed  
17                  in and used the battering ram on the door that  
18                  they thought would lead them to a third floor  
19                  apartment, but it was the third floor of the  
20                  building and there were four apartments up there  
21                  and then they go into the second floor of that  
22                  building and they say the door was wide open and  
23                  Steven Brown, their testimony is that they got the  
24                  keys from Mr. Brown.

25                  Now, what about Mr. Green? Why is he in

=SUMMATION - DEFENSE

the apartment? Is he a visitor? The volume of keys must suggest that he must work in the building, that he had access to the laundromat and the other apartments. Was he set up? Did he go into the apartment and did the owner leave him there? Was the owner of the building the person that left the building? These are questions that we have no answers to.

Ladies and gentlemen, I'm begging you not to shift the burden of proof. You will get legal instructions from the judge. I will ask you to follow the law that the Judge gives you and also asking you to use your common sense.

The prosecutor will try to argue that Mr. Green and Mr. Brown were working together. The law says it's acting in concert. I submit to you that there is no evidence that supports that beyond a reasonable doubt. Start with the misstatements that the keys were recovered from Mr. Brown.

When ADA Berland and Detective Romero got a judge to sign the search warrant for the fourth floor, which I submit to you, ladies and gentlemen, based on what we heard from Detective Hernandez. I submit to you that the apartment was

## SUMMATION - DEFENSE

1                   searched well before they got the search warrant.

2                   I think if you think back to the  
3                   testimony of Detective Hernandez, you'll remember  
4                   that he just went on, and, I don't know,  
5                   describing how they went into the closet, got the  
6                   safes out, banging away with the sledgehammer. He  
7                   forgot that they should have said they stopped to  
8                   get a search warrant. I believe that mistake was  
9                   the way it really happened.

10                  I submit to you, ladies and gentlemen,  
11                  that these detectives, they did what they wanted  
12                  to do back on November 1, 2007. The  
13                  misstatements, the misleading statements that we  
14                  heard from Detective Hernandez and from Detective  
15                  Romero are numerous.

16                  Now, when I cross-examine the detectives,  
17                  I mean it's obvious that I shouldn't expect them  
18                  to go out of their way to, you know, respond  
19                  appropriately to my questions or to give me the  
20                  answers that I want to hear, but I certainly did  
21                  not expect them to make misstatements or have a  
22                  convenient memory loss when I asked them a  
23                  question. I didn't think they would get up there  
24                  and try to mislead you.

25                  There were little things and there were

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SUMMATION - DEFENSE

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1 big things. One of the big things, I tried to get  
2 this picture of the front of the building into  
3 evidence. You may recall the difficulty that I  
4 had when I questioned Detective Hernandez and  
5 Detective Romero, and they both claimed that they  
6 do not recall the wires. I think Detective Romero  
7 took a step further and he says, Oh, yeah, I don't  
8 even remember seeing the air conditioners in the  
9 window.

10 And it's true. These pictures,  
11 obviously, were taken after November 1st. I'm  
12 sure the prosecutor will argue about that. But,  
13 ladies and gentlemen, look carefully at the  
14 pictures. You see there are wires going to every  
15 apartment. The video system in that building had  
16 been in place for years and those wires went to  
17 every apartment. The building had a locked door.  
18 You had to be buzzed in and the tenants could  
19 check to see who was buzzing. It's as simple as  
20 that.

21 But these detectives came in here with a  
22 whole different story. And, I don't know, is the  
23 ADA going to argue that sometime after the  
24 incident, that I or the tenants added these wires  
25 to the building? It doesn't make any sense,

## SUMMATION - DEFENSE

1 ladies and gentlemen. I mean, you know, what was  
2 that all about?

3 The detective came in here and tried to  
4 mislead you about a material part of this case.  
5 This is the -- this is part of the connection  
6 they're trying to make between the second floor  
7 and fourth floor, between Steven Brown and  
8 Edward Green. You look at this and it's like,  
9 what is he talking about? How could he forget  
10 that? How could he not remember this?

11 I can't believe that you will accept, I  
12 don't know, what the DA will argue, but I can't  
13 argue and say I did this or the tenants did this.  
14 I think that's too absurd.

15 With regard to the air conditioners,  
16 well, the Polaroid pictures, they're bad pictures.  
17 The DA conceded that, but if you take a look at  
18 People's Exhibit 16, also a picture of the second  
19 floor, and if you look carefully at the picture,  
20 there clearly appears to be an air conditioner in  
21 one of the rear windows.

22 Just sort of destroys that silliness that  
23 Detective Romero was talking about, that, you  
24 know, he didn't remember the air conditioners. He  
25 just didn't give it to us straight. Whatever I

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SUMMATION - DEFENSE

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1                 asked him, it was like it was pulling teeth or  
2                 something.

3                 Another example of that, try when the  
4                 keys that Mr. Green had on him were introduced  
5                 into evidence. Detective Romero testified amongst  
6                 the keys, there was a key for the second floor. I  
7                 challenged him on that. I was ready to do a  
8                 demonstration, see which one fit in the lock in  
9                 the second floor.

10                We got the evidence out and you saw what  
11                happened. We get scissors from the court clerk  
12                and I'm about to cut the bag open and then I  
13                realize when I take a look at the evidence and the  
14                paperwork associated with the evidence, that  
15                that's not even the second floor lock.

16                I submit to you, ladies and gentlemen, it  
17                was pretty clear that the detective knew that and  
18                ADA Berland, too. They were about to let me open  
19                the bag with the fourth floor lock to do a  
20                demonstration that would have been impossible to  
21                do for what I was trying to do at that time. The  
22                connection between second and fourth floor is very  
23                tenuous, very weak.

24                Detective Hernandez testified about  
25                recovering stuff from the garbage. He made it

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SUMMATION - DEFENSE

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1 seem as though the bags of garbage were fairly  
2 close to the door of the apartment. If you look  
3 if you take a look at the pictures, a small  
4 apartment. They found some stuff in the garbage.  
5 The way Detective Hernandez has it, the bags of  
6 garbage were I believe he said to the left of the  
7 couch, which would put it right by the door.

8 But if you think about the testimony of  
9 Detective Romero -- I guess you have to decide  
10 which version to accept. He comes in with the  
11 shield, bunker and gun out. It seems he would  
12 have run right into the bags of garbage.

13 Whatever the testimony, it is so  
14 convoluted that I don't think there is anything  
15 there that you can conclude and make decisions on.

16 Now, another indication that I imagine  
17 connects the apartments the assistant will argue  
18 when I'm done is that there were bags found on the  
19 second floor that had the Big Apple or red apple  
20 marking on it and in the closet on the fourth  
21 floor, there were similar types of bags found in  
22 the closet.

23 Ladies and gentlemen, I ask you to take a  
24 look at the bags. I forget what exhibit they are,  
25 but those bags, just from looking at them, they

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SUMMATION - DEFENSE

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1                   are made that way. It's not like there was a  
2                   stamp put on them. They are rolls of bags and  
3                   that's the way they're made.

4                   If you recall, Detective Hernandez, in  
5                   one of his rare moments of honesty and clarity,  
6                   admitted that the bags were relatively common.

7                   He's seen them before in other investigations and  
8                   fairly easy to buy.

9                   The video connection between the second  
10                  floor apartment and the fourth floor apartment, as  
11                  I stated earlier, I submit that that's bogus. The  
12                  detective testified that they never saw a working  
13                  monitor or TV in the fourth floor apartment. They  
14                  tried to explain that away by saying that the  
15                  camera that was posted downstairs by the door had  
16                  been removed before they looked at the monitor.  
17                  Well, it appears that that is certainly something  
18                  they concocted for the trial.

19                  I certainly want you to consider the  
20                  sworn truth of the testimony that Detective Romero  
21                  gave to Judge McLaughlin in the pretrial hearing.  
22                  He told Judge McLaughlin that he was able to see  
23                  from the monitor and he was able to see the  
24                  street. How do you reconcile that? He told the  
25                  truth there, telling us the truth in the

## SUMMATION - DEFENSE

courtroom. What is the truth? There is only one truth. There is no way to reconcile it, ladies and gentlemen.

The Court said: Inside the room on the fourth floor where the fellow was, he was sitting in the room on a couch?

Detective Romero: Yes, sir.

The Judge: Did you open the lock that got you in there or was it somebody else whom you watched do it?

Let's stop for a moment. Why do you think the judge asked him that question?

Obviously, the judge had information that there was either a police report, something that caused the judge to ask him, "was it somebody else you watched do it?"

But Detective Romero, in his honest and forthright testimony says:

No, I opened the door. Before we did it, once I noticed the key turn, I banged on the door, announced that it was the police, if anyone was in there, to come out. There was no response. I did it again. I opened the door. The room was totally dark. I shined my flashlight in the room. So the gentleman sitting on the floor was

## SUMMATION - DEFENSE

1                   crouched, just sitting there in the dark. At that  
2 time, we took him into custody, brought him out.  
3 Once we turned the lights on in the apartment,  
4 that's when we saw all the paraphernalia.

5                   The Judge asks him: Among the  
6 paraphernalia was, of course, the TV monitor?

7                   The witness goes: Correct, sir.

8                   The Judge: Was it working?

9                   Detective Romero: No everything was off.  
10 The room was totally black at that time.

11                  The Judge: Did you ever figure out how  
12 to turn the monitor on?

13                  Yes.

14                  When you turned it on, could you see the  
15 street?

16                  He told the Judge yes. He told us that  
17 he couldn't see anything on the monitor and his  
18 explanation was that the camera had already been  
19 removed.

20                  Now, part of your function as jurors is  
21 to deliberate and discuss things like this and try  
22 to reconcile the differences. The judge will  
23 instruct you, give you some instructions on how to  
24 do that. One of the things he'll tell you is that  
25 when you're evaluating the credibility of a

=SUMMATION - DEFENSE

witness, and, again, his instructions are what control, you can accept some of the testimony or reject other parts of the testimony or if you feel as though the information is to a material fact, you can reject all of their testimony.

Ladies and gentlemen, that's what I am asking you to do because this case is so important and these detectives, they came in here, and they weren't straight with us. They weren't honest with us. They weren't direct with us, and no one should be convicted on this type of testimony. I'm asking you to reject their testimony.

These detectives came in here with a one-track mind, to try and get a conviction instead of being honest and forthright with their testimony. Their explanation about the picture, about the wires is outrageous. They do not remember, they do not recall seeing the wires. So what does that leave us? I went there and put the wires up? The tenants put the wires up? The wires were there, always there, ladies and gentlemen.

These guys just lied to you. Both detectives' credibility leave a lot to be desired. The suggestion that these apartments were recently

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SUMMATION - DEFENSE

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1 converted to SROs is laughable. Look at the  
2 pictures. There is no evidence, no suggestion of  
3 any new construction or recent construction. It's  
4 clear that the building has been like it is right  
5 now, it's been that way for years.

6 These officers, these detectives tried  
7 too hard to get a conviction when they just needed  
8 to come in here and be straightforward and honest.

9 In his opening remarks, and again, what  
10 I'm saying now is not evidence, the opening  
11 remarks are not evidence, the closing remarks are  
12 not evidence, but in the opening remarks the  
13 assistant district attorney suggested that the  
14 detectives used caution. Ladies and gentlemen, I  
15 submit that these men went through that building  
16 and did what they wanted to do.

17 They were being cautious to a degree, but  
18 they just took over and went door to door in a  
19 systematic search of this building, harassing  
20 people, terrorizing people, just doing what they  
21 do.

22 I submit, they didn't even wait for the  
23 search warrant for the apartment on the fourth  
24 floor, and Detective Hernandez in his testimony,  
25 basically said it.

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SUMMATION - DEFENSE

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1                   Ladies and gentlemen, you all promised to  
2 follow the law. The burden of proof is on the  
3 assistant district attorney, Mr. Berland. It  
4 hasn't shifted. Mr. Green and I do not have to  
5 prove anything. There is a presumption of  
6 innocence.

7                   There is no proof. You should not even  
8 think about a conviction when you're not even sure  
9 what happened, what version of this incident is  
10 the truth for none of the charges. The first  
11 charge is Criminal Possession of a Controlled  
12 Substance in the First Degree. The drugs were in  
13 a locked safe.

14                  As the prosecutor brought out, there's no  
15 evidence, there's nothing to suggest that  
16 Edward Green had the combination of the safe or  
17 even knew the safes were in the closets. The  
18 Judge will instruct you on constructive  
19 possession, not guilty.

20                  One of the other charges is Criminal  
21 Possession of a Controlled Substance in the Third  
22 Degree. And the paraphernalia charges, with  
23 regard to the stuff that was -- going backwards,  
24 start with the paraphernalia charges, with the  
25 stuff that was in open view when the detective

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SUMMATION - DEFENSE

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1                   entered the room, I submit to you that none of  
2                   those items so clearly represent a conviction to  
3                   drug usage that Mr. Green is guilty beyond a  
4                   reasonable doubt of having knowledge of it.

5                   I submit to you that a person involved in  
6                   drug trafficking may recognize that some of the  
7                   items can possibly be used. The heat sealer on  
8                   the floor or if he even recognized the digital  
9                   scale that was on the TV stand, the Baggies are  
10                  regular Ziploc sandwich Baggies sitting on the  
11                  counter.

12                  And the alleged white powder. Well, I  
13                  don't know what you are going to conclude about  
14                  that. If you believe that there was a white  
15                  powder --

16                  THE COURT: Give him a tap. I want to  
17                  make sure you hear this. I didn't mean to  
18                  embarrass you.

19                  MR. KEITH: With regard to the white  
20                  powder, I don't know what you will conclude about  
21                  that. If you believe there was white powder or  
22                  not, the ADA, in his opening remarks, I imagine he  
23                  would repeat something about it being sprinkled  
24                  all over the place.

25                  If you look carefully at the Polaroid

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SUMMATION - DEFENSE

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1 pictures, I don't see any white powder. The  
2 detective and the assistant, they refer to the  
3 white powder as cocaine residue, but, if there was  
4 white powder, it wasn't tested. There is no  
5 evidence of it being tested. It's like -- I don't  
6 know what you do with that. It's reasonable  
7 doubt.

8 I submit that the whole house was wired,  
9 all nine apartments. On another note, when they  
10 enter the apartment, I believe the prosecutor will  
11 make an argument to the effect that yes, in his  
12 mind, Mr. Green was supposed to get up and open  
13 the door for them. I believe you will get an  
14 instruction from the judge that he had a right not  
15 to do that.

16 Ladies and gentlemen, I ask you to  
17 combine the law with your common sense. If we  
18 accept the version, the version that is given to  
19 us by, I believe this version is very contrived,  
20 but the version given to us by Detective Hernandez  
21 and Detective Romero that they grabbed this shield  
22 or the bunker thing and rushed into the apartment  
23 with his gun out, what would you expect Mr. Green  
24 to do under those circumstances? I certainly  
25 wouldn't move, I don't think anybody else in here

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SUMMATION - DEFENSE

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1           would move under the circumstances, but that's if  
2 you accept the version.

3           You recall there is an earlier version  
4 when they spoke directly to the judge and it  
5 didn't happen that way. Again, how are you going  
6 to decide and make inferences. He's going to  
7 argue that there's some guilt involved in that,  
8 but you're not sure what happened.

9           There is only one truth. Either it  
10 happened one way, the other way or somewhere in  
11 the middle. I guess you will have to reconcile  
12 that and figure that out. That's something that  
13 you are going to have to discuss when you are  
14 deliberating.

15          He told the judge that he had a  
16 flashlight and took him into custody and brought  
17 him out. But he told you that he had the shield,  
18 the bunker and a gun in his hand. I don't know,  
19 how do you reconcile those two things?

20          There's still the question of him opening  
21 the door. Some of you may be sitting there saying  
22 Well, why didn't he just open the door? I submit  
23 to you, ladies and gentlemen, like most of the  
24 other people in that building it was probably just  
25 simply intimidating. He didn't want to open the

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SUMMATION - DEFENSE

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1                   door, he didn't want to be bothered with the  
2                   police.

3                   I think that this issue, that it's a  
4                   matter of perception, the different environments  
5                   that we live in. I submit that some people just  
6                   don't want to be bothered with the police.

7                   I know that's probably contrary to the  
8                   way many of you were brought up. If there is a  
9                   problem, you go to the police, but for some of us,  
10                  we hesitate to do that, and we have a right not  
11                  to, and I argue that there should be no negative  
12                  inference drawn from the fact that Mr. Green  
13                  didn't get up and open the door for those police  
14                  officers.

15                  Some of us only go to the police when  
16                  it's absolutely necessary. It's just the way it  
17                  is. Unfortunately for some of us, the  
18                  relationship with the police department, you know,  
19                  makes it that way. Last year in 2007, 19 black  
20                  men were shot by the police, ten were killed --

21                  MR. BERLAND: Objection, Your Honor. I  
22                  don't know what this has to do with the trial.

23                  THE COURT: I hope you're not  
24                  interjecting an issue into this trial that has no  
25                  place.

=SUMMATION - DEFENSE

Sustained. Disregard it.

MR. KEITH: So, ladies and gentlemen, what's the truth? How do you evaluate the testimony you heard in this case from the detectives. I submit their techniques and their testimony should be rejected. Their lack of investigation, rejected.

When you go back to talk about the case, I ask you to take another look at the pictures, in particular Defendant's E in front of the building with the wires. I ask you to take a look at Defendant's Exhibits B and C, the layout of the apartment on the second floor and fourth floor.

I believe Detective Hernandez said something about a black garbage bag covering the window or something to that effect. Again, the prosecutor will argue and rightfully so that the pictures were taken after the incident. The black garbage bag, I submit, is something created. It's just not there.

People's Exhibit 22, the detective suggests that this picture came from the fourth floor apartment. Now, in this picture, in the background, you can clearly see that there are some Venetian blinds. It's just inconsistent with

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SUMMATION - DEFENSE

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1                    everything we have heard. If there is the black  
2                    garbage bag or whatever, it's certainly not  
3                    reflected in this picture. I think the detective  
4                    made a mistake.

5                    If you look at the other Polaroid  
6                    pictures, you will see that in the second floor,  
7                    that there's some windows with some Venetian  
8                    blinds on it. Actually, if you take a look, I  
9                    referred to it before, at People's Exhibit 16, it  
10                  appears, and it's hard to tell, but it appears  
11                  that item might be sitting right here to the left  
12                  center of the picture. This item here appears to  
13                  be the air conditioner. Take a look at the  
14                  pictures.

15                  I think the picture somewhat -- further  
16                  undermines the information or the misinformation  
17                  that these gentlemen, these detectives gave you.

18                  I submit that it's absolutely clear that  
19                  Mr. Green did not live at that location. The  
20                  evidence, the number of keys suggests that he may  
21                  have worked there as a superintendent. I'll  
22                  concede that I didn't put on a case, but, I ask  
23                  you to consider my argument and to use common  
24                  sense.

25                  One of the items admitted into the

## SUMMATION - DEFENSE

1 evidence, Defendant's Exhibit G, I used this  
2 property voucher to cross-examine Detective Romero  
3 with regard to his statement that there were keys  
4 for the second floor. In the bottom part of this,  
5 there is a narrative that describes, you know,  
6 where they got keys from and what they were for.

7 I submit to you, ladies and gentlemen,  
8 that if there were a key or keys for the second  
9 floor, you would have included it, and I submit to  
10 you that there was no key for the second floor,  
11 that the connection between the fourth floor and  
12 the second floor just doesn't exist.

13 The other thing in the document that's  
14 now in evidence and that you can read, Edward  
15 Green lives at 1133 Ogden Avenue in the Bronx. I  
16 know I questioned the detective about that, about  
17 whether or not he had a wallet or whether or not  
18 he had any identification on him. Again, the  
19 detectives, they both sandbagged me and claimed  
20 that they didn't recall, they don't recall.

21 I submit to you, ladies and gentlemen, if  
22 it was a situation where he did not have any  
23 identification, they would have said something  
24 about it. They had -- on one hand they tried to  
25 argue and suggest that Mr. Green didn't cooperate

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SUMMATION - DEFENSE

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1                   with him at all, he just sat there and didn't do  
2 anything. Then, on the other hand, I guess the  
3 suggestion is maybe he told them this address.

4                   I submit that that is not the case. They  
5 had his identification. They looked on it. They  
6 got his address, and that's what's included in the  
7 police reports.

8                   Ladies and gentlemen, I'm about to wrap  
9 this up. If you need to check any of my  
10 arguments, and I know the Court Reporter and Judge  
11 do not like to me to say this, but you can have  
12 testimony read back. It's only testimony from two  
13 people. Check and verify the arguments that I've  
14 made to you.

15                  I know in a few moments that the  
16 assistant district attorney will make his remarks.  
17 I do not get a chance to reply to the remarks. He  
18 gets the first word and last word. He gets to  
19 draw up the search warrants, put these guys on the  
20 witness stand. Now, he will make his arguments.

21                  His argument, like my argument, is not  
22 evidence. I'm sure that whatever he says, that  
23 there's evidence or lack of evidence in this case  
24 to counteract it. Ladies and gentlemen, I trust  
25 in your intelligence and in your common sense to

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SUMMATION - DEFENSE

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1 see through that.

2 Ladies and gentlemen, you all promised  
3 that you would give Edward Green a fair trial.  
4 You all said that you would accept the law and  
5 follow the law. Ladies and gentlemen, you cannot  
6 hold it against Mr. Green or draw an adverse  
7 inference because he did not testify. You all  
8 promised that you would accept the law. He's  
9 presumed innocent.

10 This case is weak. You are forced to  
11 speculate and pick and choose which version is the  
12 truth. What are you going to believe? What are  
13 you going to conclude? Then you still have to  
14 somehow make a connection between Mr. Green and  
15 these drugs in this locked safe. It's just not  
16 there. The judge will instruct you on the law  
17 with regard to constructive possession. Ladies  
18 and gentlemen, I submit that based on what you  
19 have heard and what you haven't heard, Mr. Green  
20 is not guilty of all these charges.

21 Thank you.

22 THE COURT: People.

23 MR. BERLAND: Can we approach,  
24 Your Honor?

25 THE COURT: Yes.

## =PROCEEDINGS

(Whereupon, a sidebar conference was held on the record out of the hearing of the jury.)

MR. BERLAND: I practice not to object during closing. Mr. Keith, he said at one point the defendant knew nothing about the paraphernalia.

THE COURT: I heard it.

MR. BERLAND: The only people --

THE COURT: I heard it. I hear it.

MR. BERLAND: I think that's misleading.

THE COURT: Don't look at those folks.

MR. BERLAND: Yes, Your Honor.

THE COURT: What is it that you are asking me to do?

MR. BERLAND: Open my case and put in direct evidence of the witness of the fact that he has sold drugs in the past.

THE COURT: How? How would you do that?

MR. BERLAND: Through the undercover detective, Your Honor, who he sold to.

THE COURT: The '96 case?

MR. BERLAND: Yes.

MR. KEITH: Your Honor, with regard to that, the conviction was in '96. The incident was in '94, just to be accurate.

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PROCEEDINGS

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1                   THE COURT: Do you have that witness in  
2 the room?

3                   MR. BERLAND: I do not, Your Honor. I  
4 did not anticipate that happening.

5                   THE COURT: I gather your file doesn't  
6 have certificates of convictions for the three  
7 felony offenses he's been convicted of?

8                   MR. BERLAND: Correct. We can get that  
9 within an hour, probably. It's a New York case.

10                  THE COURT: There is no doubt in my mind  
11 that people are allowed to counter this statement  
12 that was made in the defense's summation. Why,  
13 since we all agree that this is the fact, why --

14                  MR. KEITH: I don't necessarily agree.

15                  THE COURT: I know you do not agree that  
16 you in a way opened the door again. Let's put  
17 that aside. What I was referring to was we all  
18 agree that there were these convictions and since  
19 there was an official New York State NYSID history  
20 that reflects at least two of the convictions, why  
21 don't we just tell the jury that the defendant has  
22 felony drug convictions and we do not have to give  
23 them an iota more of information on that.

24                  MR. KEITH: Your Honor, again, I think  
25 the Court and prosecutor are improperly shifting

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PROCEEDINGS

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1                   the burden of proof. There is no evidence to  
2                   suggest that he had any knowledge what these  
3                   things are used for. I don't think that this  
4                   opens the door. I ask again that Your Honor  
5                   declare a mistrial because of all of the mistakes.

6                   THE COURT: Your mistakes or mine?

7                   MR. KEITH: Both.

8                   THE COURT: I don't think I made any  
9                   mistake.

10                  MR. KEITH: I don't think I made any.

11                  THE COURT: I know you made two.

12                  MR. KEITH: I don't think so.

13                  THE COURT: That is your reaction to my  
14                  saying why don't we simply say the official  
15                  New York State criminal history of Mr. Green  
16                  discloses felony drug convictions?

17                  MR. KEITH: I think that deprives him of  
18                  a fair trial.

19                  THE COURT: Procedurally, as opposed to  
20                  whether or not the rule is correct and whether or  
21                  not we adjourn to get a witness who will say  
22                  Mr. Green sold me the drugs or whether to adjourn  
23                  to get a certified copy of a New York State NYSID  
24                  sheet or certified copy of New York State  
25                  convictions, why don't we move this along to what

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PROCEEDINGS

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1 you perceive to be an unhappy end and just tell  
2 them the official New York State history of the  
3 defendant is that he has felony drug convictions?

4 MR. KEITH: Again, Your Honor, I don't  
5 think that would be appropriate. If the People  
6 want to -- you know, if you want to proceed down  
7 this road, I suggest that the People give the  
8 proof.

9 MR. BERLAND: We're here on Monday rather  
10 than Friday because you represented that you had a  
11 witness. As skeptical --

12 MR. KEITH: I spoke with the witnesses  
13 over the weekend and made a decision not to put  
14 that on.

15 THE COURT: I'm sure for perfectly valid  
16 reasons. So you want this posture to be such that  
17 there will be an obvious break and when we come  
18 back, the thing that would have clearly caused the  
19 break is the finding of a document which says he  
20 has a drug conviction?

21 MR. KEITH: Your Honor, that document on  
22 that statement is going to effectively deprive  
23 Mr. Green of a fair trial. No, I will not consent  
24 to that.

25 THE COURT: Give me a minute.